International Union of Operating Engineers, Local 181, AFL-CIO (Raymond Construction, Inc.) *and* Richard L. Russell. Case 9-CB-5049

29 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 31 August 1983 Administrative Law Judge Robert G. Romano issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. This case was heard before me at Louisville, Kentucky, on July 21 and 23, 1982. The charge in Case 9-CB-5049 was filed on August 31, 1981,[1] by Richard L. Russell, an individual, against International Union of Operating Engineers, Local 181, AFL-CIO (herein the Respondent or Local 181). The complaint was issued on October 14 and initially alleged, inter alia, that Local 181 operated a nonexclusive source of referrals, and that during April Local 181 attempted to cause Raymond Construction, Inc. (herein Raymond or the Employer) to discharge employee Russell because he had obtained employment with the Employer without the Respondent's approval and had refused to leave the job with the Employer at the Respondent's request for reasons other than the employee's failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership in the Respondent, in violation of Section 8(b)(1)(A) and (2) of the Act; and that on May 6 the Union brought internal union charges against Russell, and subsequently fined him $750, because he had obtained a job with the Employer without the Respondent's approval and because he had refused to voluntarily quit his job with the Employer at the Respondent's request, in violation of Section 8(b)(1)(A) of the Act. On October 19, the Respondent filed an answer denying the allegation that it operated a "non-exclusive source of referrals" and denying the commission of any unfair labor practices.

At the hearing on July 21, the complaint was amended without objection to allege that Local 181 operated an "exclusive" referral system. On July 23, amendment of the complaint by the General Counsel was allowed over the Respondent's objection to allege an additional matter essentially one deemed already litigated, viz, that since early March the Respondent refused to permit Raymond to hire Russell pursuant to certain contended practices existing under an exclusive hiring hall operated pursuant to a collective-bargaining agreement for reasons other than Russell's failure to tender periodic dues and/or service fees, which allegedly resulted in a loss of employment by Russell during the period March 9 through 20, and which if found as alleged would constitute further conduct to be determined to be in violation of Section 8(b)(1)(A) and (2) of the Act. The Respondent has entered further denial thereon and it essentially contends that the existing practices under the referral hall operation were not as the General Counsel has contended they were. The case also presents issues of hiring hall procedures in juxtaposition to a "double breasted" operation.

On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed by the General Counsel and the Respondent about September 3, 1982, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is not in issue. The complaint alleges, the Respondent admits, and I find that the Employer, Raymond Construction, Inc., is a Kentucky corporation engaged in the construction industry as a general contractor at its Louisville, Kentucky facility; that during the past 12 months it purchased and received at its Kentucky jobsites goods, products, and materials valued in excess of $50,000 directly from points located outside the State of Kentucky; that Raymond is an employer within the meaning of Section 2(2), (6), and (7) of the Act; and that Local 181 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In 1981, Local 181's total membership (inclusive of construction employees, stationary employees, and retirees) was some 5000. Local 181 has some 3800 active members working in the construction industry. Local 181 operates its hiring hall under some 300 contracts which it

[1] All dates herein are in 1981 unless otherwise shown.

has negotiated with various employer contractor associations and/or construction employers. Thereunder, Local 181 services equipment operator employment needs of employers who do business in three basic operational areas of building, heavy, and highway construction. Highway construction is principally involved in this proceeding.

Highway Contractors, Inc. is an organization composed of employers who are engaged in highway construction. The organization exists for the purpose of representing its employer-members in negotiating and administering collective-bargaining agreements with various unions, including Local 181. Raymond is an employer-member of that organization. During the time material herein, Raymond was a signatory (along with Local 181) to certain successive agreements (herein the Highway Agreements) which had durations, respectively, from July 1, 1978, through June 30, 1981, and (currently) from July 1, 1981, through June 30, 1984.

The Highway Agreement contains provisions whereby the parties recognize the Union's position to aid employers in recruiting needed employees who can meet the standards of the trade. The employer agrees to notify the union "when new, additional or replacement employees are needed," and the union is "to refer duly qualified applicants upon a nondiscriminatory basis." The decision on hire and tenure is the employer's, along with the employer being "the sole judge as to the qualifications of any applicant for employment"; but the employer agrees to give preference of employment within a certain agreed recruitment area. I find Local 181 operates an exclusive hiring hall, inter alia, for highway construction.

The recruitment area provided by the Highway Agreement extends throughout 28 counties in the State of Indiana and most of the State of Kentucky, covering all counties in the State of Kentucky except four, viz, Boone, Campbell, Kenton, and Pendleton. Insofar as is additionally pertinent herein, Kenton County, Kentucky, is serviced by an affiliate, Local Union 18, out of Cincinnati, Ohio.

Administratively, Local 181 has five district offices. District 1 is located at Henderson, Kentucky, where Local 181 maintains its headquarters. District 2 is located at Evansville, Indiana. District 3, its largest office, is located at Louisville, Kentucky. District 4 is located at Lexington and District 5 at Paducah, Kentucky. The affairs of the Local Union are conducted by usual local union officers, but inclusive of a business manager, an elective officer, who is the chief executive officer of the Local Union, and who, inter alia, appoints and is in charge of employed district representatives and their subordinate business representatives (or agents), who are located in the various districts.

Lloyd Owen, a member of Local 181 for 36 years, with previous local union officer experience, and with service, inter alia, as a business representative at Louisville from May 1968 through September 1979, has since the latter date been business manager of Local 181. Lloyd Mears, 39 years a member of Local 181, has been a business representative at Louisville for 11 years, reporting to Howard Mills, the district representative of District 3 Louisville. Aubrey Buchanan, a member of Local 181 for over 20 years, was a business representative appointed by business manager Owen at Louisville from October 1979 until February 1981, at which time, because of the economy, there was a required retrenchment in staff. Bill Bland was also a business representative at Louisville. During material times, Gene Creech was a business representative at District 4 Lexington who succeeded Buster Marlow and a second unidentified (apparently temporary) business agent in serving, inter alia, Hindman, Kentucky, in eastern Kentucky.

Local 181 operates an exclusive referral hall in the five districts. Mechanically, a card index system is used to create an out-of-work list which is sent to each district daily and coordinated. An individual in registering and using the out-of-work list will indicate the amount of districts the individual is willing to work in. The out-of-work lists will show (daily), in addition to the employees reporting out of work, employees called back to work and employees sent out or referred to work. In general, employees are referred on a first-in, first-out basis to an available job for which they are qualified in the district or districts they have individually designated. Listings are made alphabetically and numerically.

There are essentially three basic agreements that create and govern the operation of the above referral hall, viz, the Building Agreement, the Heavy Agreement, and the Highway Agreement. As noted there are some 3800 Local Union 181 members, as well as an indefinite number of members of other local unions (herein out-of-local members) and others,[2] who use the referral hall in the three above construction areas. Insofar as pertinent, an out-of-local member, as provided for by the International's constitution, is required to pay to the Local certain service dues (or fees). They are: upon registering for use of the out-of-work listing service dues of $12.50 per month and upon securing employment weekly service dues in 1980 of $2.50 and apparently commencing in 1981 of $5 per week.

In March 1981, there were approximately 350 individuals registered as out of work at Louisville, some 97 percent of whom were members of Local 181. Certain of Mears' testimony would appear to reflect such number was not abnormally high for Louisville. There are shiftings in listing numbers in districts related to individuals registering for employment where the work is to be found; and Louisville is the largest district office. Nonetheless, the number out of work is deemed substantial. Morever, Business Manager Owen also testified pointedly that on the average there was 13–14 percent of Local 181 members out of work in 1981. An individual in using the referral hall cannot effectively make a request for a referral to work on a particular job, but must await the outcome of his turn in referral to then available jobs. All of the above facts are essentially not in dispute.

[2] Although nonunion employees may and do use the halls, insofar as material herein the pertinent Highway Agreement provides in art. XVI that employees who are not members of the Union are to join the Union on or after the eighth day of their employment under the agreement, and that "[s]uch employees who become members of the Union must as a condition of continued employment maintain their membership in good standing."

Local 181's Building Agreement has a specific written provision whereby a signatory employer may call the hall and request referral of an individual by name who has worked for the employer within the past 12 months. The same provision was not expressly contained in either the Heavy Agreement or the Highway Agreement. However, Local 181 has established similar practices under the latter contracts, discussed infra. Presently it is observed that there is conflict between the General Counsel and Respondent Local 181 as to what was Local 181's practice as applicable to the highway (or road) contractors, with Respondent Union contending, inter alia, a requested employee had to be registered on the out-of-work list to be referred, and the General Counsel contending that in actual practice that had not been the case.

B. *Russell's Union Membership and Employment History*

1. Russell's union membership

Richard L. Russell became a member of Local 181 in the early 1960s. Russell remained a dues-paying member of Local 181 for 7–8 years. During this period Russell went into business for himself. Russell subsequently allowed his union membership to lapse when he became unable to pay dues. Records introduced by the Respondent reveal that Russell last paid dues to Local 181 in September 1971, and that he was suspended by Local 181 on December 31, 1971, for nonpayment of dues.

In September 1973, Russell secured employment in the construction of a railroad spur for a feed company in Champaign, Illinois. At that time Russell became a member of International Union of Operating Engineers, Local Union No. 841 (herein Local 841), located at Terre Haute, Indiana. Russell has remained a dues-paying member of Local 841 to date under circumstances described infra.

2. The relationship between Raymond and Bluegrass Landscaping Company

For years Raymond has operated as a union highway contractor. As noted, Raymond was and is a signatory to the past and present Highway Agreements. Bluegrass Landscaping Company (herein Bluegrass) is not signatory to that agreement; and Bluegrass has generally operated nonunion, with an exception to be discussed infra.

In brief, Raymond and Bluegrass have common officers, common ownership, and common supervision. Thus, individuals who supervise Raymond's construction projects have, off and on, also supervised Bluegrass projects, apparently since as early as 1975. Though supervision is always paid by Raymond, there has regularly been Raymond charge back to Bluegrass for the provision of such supervisory services. Although Bluegrass has always maintained a separate hourly payroll and office, it otherwise shares the same headquarters with Raymond at the same business location in Louisville. There have been some, but relatively few, transfers of employees evidenced herein between the two companies. I find it unnecessary to reach Russell's asserted view that Bluegrass is a subsidiary of Raymond as a legal issue, as the record would appear sufficiently clear their relationship is such as to constitute them a single employer. The Union, however, was long aware that Bluegrass has operated as a separate unit, viz, as the nonunion construction arm, or element of Raymond, with whom it alone had contracted on the Highway Agreement. Cf. *A-1 Fire Protection*, 233 NLRB 38, 39 (1977), remanded 600 F.2d 918 (D.C. Cir. 1979), reaffirmed 250 NLRB 217 (1980), remanded sub nom. *Road Sprinkler Fitters Local 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982).

3. Russell's history of employment with Raymond and Bluegrass

a. *Raymond's Hindman project in eastern Kentucky*

In the fall of 1979, Raymond had a 40-mile road construction job at Hindman in eastern Kentucky. The job was supervised by Pat Patterson as general superintendent and by Marion Bischoff as superintendent. Patterson is a corporate officer in both Raymond and Bluegrass. Bischoff has been employed by Raymond since July 1967 and for the last 10 years in supervision. Bischoff, a former member of Local 181, has been on withdrawal from the Union for 10 years. Raymond could not get enough operators on the Hindman project. Housing was a problem; there were no restaurants; and distance was a problem, especially with an existing gas shortage. Bischoff testified credibly that it got so bad that Local 181 business agent Buster Barlow (apparently also out of Lexington) told the Employer that if it could find an operator that could do the job to hire the operator and "I'll permit him."

Though it is unclear who approached whom, Russell testified that he had talked to Patterson, who told Russell that Raymond was short on operators in eastern Kentucky; and that if Russell went there he would be cleared in. Russell confirmed that Patterson had already talked to the business agent before Russell arrived. It is uncontested that Local 181 business agent Gene Creech out of District 4 Lexington earlier visited with Russell on this jobsite. Bischoff recalled that he had not called anyone for Russell; rather, Patterson had brought him Russell's name, who was then employed. Russell testified that Creech introduced himself and discussed how the job was going with Russell by which Russell viewed, and Bischoff has confirmed the view that Creech had thus cleared Russell into Local 181. Russell worked on the Hindman project from early September through the first of November 1979. Normally when a man is cleared onto a work project in Local 181's jurisdiction, a work record is generated by the clearing business agent. Whether that should have been done by Barlow, by the (temporary) unidentified business agent, or by Creech is not clear. Local 181, after making a diligent search, could find no work record on Russell, on this or any subsequent job for which he was cleared within Local 181's recruitment area, though in evidence is an available record of Russell's payment of service dues during certain periods, but notably not inclusive of the Hindman work period.

b. *Raymond's project in Covington, Kenton County, Kentucky*

Kenton County is one of the four counties in Kentucky excluded from coverage by Local 181's Highway Agreement. It is within the jurisdiction of Local Union 181. Bischoff was assigned to the Kenton County project. Bischoff testified without contradiction that he had obtained the approval of a Local 181 business agent to transfer Russell (and one other operator) to the Kenton County project. Russell confirmed that Bischoff had transferred him from Hindman, eastern Kentucky, to perform road work for Raymond at Covington, where Russell worked on road repair from November 1, 1979, until, as he recalled it, late January/early February 1980, though there is indication from Local 181's record of Russell's payment of service dues to Local 181 that Russell probably finished in Covington prior to January 7, 1980. In any event Russell's next employment was by Bluegrass on its Fisherville project.

c. *Bluegrass' (union operated) Fisherville project*

Louisville is located in Jefferson County, Kentucky. Bluegrass obtained a contract from the State of Kentucky to perform road work on Route 155 south of Jefferson County (herein the Fisherville project). Patterson was general superintendent; Bischoff was superintendent; and Ed Baker was initially an assistant on that project.

Russell's recollection was that he worked at Fisherville from January or the first of February 1980 through the fall of 1980. Russell also recalled that when the job started Bluegrass was in the process of signing a union contract for that project. However, Russell was already employed on the job. According to Russell, business agent Aubrey Buchanan came by and asked Russell if Russell had been cleared into Local 181, and Russell informed Buchanan at that time that he had, by Creech, out of Local 181's Lexington office (in regard to the Hindman project). The latter was confirmed by Buchanan. Russell also testified that he had thereafter paid $2.50 per week service dues to Local 181 while working at Fisherville. The first entry of any service dues paid by Russell is on February 15 for the period January 7 through February 16, 1980. As Russell's immediate prior employment was in Kenton County, not within Local 181's contractual area, but Local 181's, as earlier noted, it is thereby indicated that Russell more probably had begun his employment with Bluegrass at Fisherville on or about January 7, 1980. I so conclude and find.

Bischoff testified that Patterson had arranged with Local 181 that the Fisherville job would be operated union. A letter of assent (to the union contract) was executed on behalf of Bluegrass with Local 181 covering that one project. The same was essentially confirmed by Buchanan, and was confirmed as well by Business Manager Owen. Bischoff testified relatedly that at the time the prevailing wage rate on such road project was the same as union scale and that if a job was operated union the fringe benefits were to be paid to various union trust funds; if the job was nonunion, fringe benefits were paid in kind directly to the employee. For the Fisherville project Bishoff also testified corroboratively that the above fringe benefit contributions on the Fisherville project were paid to the Union (trust funds). I find that Bluegrass' Fisherville project was operated under union contract conditions pursuant to a written agreement (letter of assent) covering that one job.

Bischoff was on vacation for the last 3 weeks of February 1980. Baker took over as project superintendent at Fisherville. When Bischoff returned from vacation he acted more as an assistant general superintendent supervising in and out of Fisherville, but also supervising another job in Covington. By May Raymond had obtained three jobs in Covington, and from about July through December 1980 Bischoff was involved full time in Covington supervision in Kenton County. Thus, after July 1980, Patterson and Baker ran Fisherville exclusively. Russell's next employment was to be at Raymond's Outer Loop project. As Russell has testified that he normally received assignments from either Patterson or Bischoff and as Bischoff has testified he had nothing to do with the Outer Loop project at this time, I conclude and find that Patterson employed Russell initially on Raymond's Outer Loop project.

d. *Raymond's Outer Loop Project*

Neither Patterson nor Baker testified in this proceeding. Nonetheless, it is clearly established that Russell *was*, as he claimed, one of the first operators employed by Raymond on the Highway 65 south project located south of Louisville in Jefferson County (herein the Outer Loop project) beginning around mid-September 1980. This finding is based on Russell's credited testimony of performing startup clearing work for the Engineers, and as confirmed by joint exhibit factual provision that Russell's name had appeared on an Outer Loop initial timesheet submitted by the superintendent of that project for the week ending September 21, 1980 (and prior even to the first certified payroll for that project), and with an essential confirmation of early clearance thereon on by Buchanan.

Thus, Buchanan, called as a witness by the General Counsel, testified that he had held an initial prejob conference with Ruby Construction. Buchanan later attended a second prejob conference with Raymond, which had been awarded the subcontract on the Outer Loop project. Baker was assigned as project superintendent. Bischoff still was assigned at the time to full-time service in the Covington area in Kenton County, and was not reassigned to the Outer Loop project until late December or early January after the Outer Loop job had been temporarily shut down (probably at the very end of December). It is thus more likely that it was Baker who attended the prejob conference along with Patterson (rather than Bischoff, as was recalled by Buchanan). In any event, I find that Patterson was present, that Patterson asked Buchanan if it would be all right to bring two operators to the project, Russell and a drill operator, and that Buchanan (initially) cleared Raymond's request. Owen confirmed that this was a common practice.

However, sometime later, Superintendent Baker told Russell on the jobsite that Buchanan had called and asked that Russell and drill operator Darrell Ulrey go to

Local 181's office, which both thereafter did. When Russell arrived he asked Buchanan what the problem was. Russell believed that Buchanan had recognized him from the Fisherville project, but Buchanan did not say that. Neither does it appear that he had cleared Russell because of work at Fisherville, prior Raymond work within the past year, rather than as above. Russell testified that Buchanan replied: "Russell, there's no problem with you, but—I can't clear Darrell in because he don't have a card." According to Russell, Buchanan then said, "Russell, you go on back to work." Russell did, and asserted generally that he had worked on the Outer Loop project until its shutdown for the winter months. However, the evidence reveals that Russell had received other assignments in the interim, as shown infra.

Buchanan essentially confirmed Russell's arrival at the hall, with Russell stating that Baker had told him to come in, which Buchanan testified was a mistake (apparently made by Baker) as Russell had been already cleared at the prejob conference, had a book, and was paid up on service dues. (Russell's service dues record confirms that Russell had already paid service dues in August covering the period through September 30, 1980.)

Russell returned to the jobsite and, from stipulated Joint Exhibit 1 containing certain payroll compilations, it appears that Russell worked directly on the Outer Loop through the payroll week ending October 19, 1980. Buchanan testified generally that sometime later he had noticed that Russell was gone from the Outer Loop job in late 1980, but Buchanan was not aware where Russell had gone.

Russell testified that he did on occasion transport certain heavy equipment on a lowboy, beginning while at Fisherville, but also while at the Outer Loop, essentially in November, and mostly to Florida. Russell also acknowledged that he could have driven the lowboy transport during the specific weeks ending November 9, 16, and 23. I find that he did, and substantially so during the weeks in that period. However, contrary to the Union's assertion (in its opening statement) that Russell had also transported such equipment in early 1981 and was not operating under the contract in doing so, I credit Russell's uncontradicted testimony that he did not believe he had transported any equipment in early 1981. Although there is some confusion in Russell's testimony as to his earlier transport of equipment for Raymond and Bluegrass, there is none as to his testimony that he was always paid the usual operator pay while transporting the heavy equipment to the jobsites where most of the time one of the operators present on the jobsite would then unload it. Moreover, I credit Bischoff's illuminating testimony in that regard that he knew the whole story on the transport of such heavy equipment by Russell; that it had occurred in late 1980; that it was all equipment owned by Raymond; that it was for Raymond projects (in Kenton County and Florida); and that Raymond had no contract with the teamsters, but regularly paid the people who transported its heavy equipment operators' pay while doing so.

It is apparent from the foregoing, as Bischoff has related in summary, and I now find, that from September 1979 through November 1980 Russell had worked under union contract conditions for Raymond (union) projects and Raymond work, or the Bluegrass Fisherville project, itself specially operated under union contract conditions. Russell's next assignment, however, would be for a Bluegrass *nonunion* project at Corbin, Kentucky. Bischoff had nothing to do with the assignment of Russell to that project.

e. *Bluegrass' nonunion job in Corbin, Knox County, Kentucky*

Russell related that he was transferred to the U.S. 25E road project south of Corbin in Knox County (herein the Corbin project) by either Patterson or Bischoff. However, I credit Bischoff that he was supervising the projects in Kenton County through their playdown in late December 1980, at which time he was reassigned to the Outer Loop job (I find) about the first week in 1981; that the Outer Loop job was shut down for a week or so, and Russell was not there; and that Bischoff did not start going to (supervising) Corbin, Kentucky, until the late summer of 1981, though Bischoff acknowledged that he knew Russell had worked in Corbin (from an early 1981 visit there). More pointedly, I credit the specific testimony of Bischoff that he had not transferred Russell to Corbin, as he was not around there at the time of Russell's initial assignment (employment) there. It is thus again likely that it was dual officer Patterson who had next assigned (employed) Russell on the Bluegrass' Corbin nonunion project in Knox County. I further credit Bischoff's testimony that he had nothing to do with the running of the Corbin project during the material time of Russell's employment there. Nonetheless, Bischoff was aware that Russell was working at the Bluegrass Corbin project and that it was being operated nonunion.

Russell appears on the (Corbin) Knox County payroll beginning the week ending December 7, 1980, and extending through March 8, 1981. (In passing it is observed that it is thereby indicated that Russell *had* worked at least 1 day, more probably 2, at Corbin in early March, thus probably last on March 3, discussed infra.) In the interim on January 6, 1981, Russell paid his service dues to Local 181 for the period covering October 1 through December 20, 1980, thus covering working time for both Raymond's Outer Loop and transport work and Bluegrass' nonunion Corbin project work. Russell explained generally that he was being switched around between Raymond and Bluegrass, that he could not remember which had what, and that rather than try to keep up with it he had just paid service dues for all of the time. On the other hand, Russell acknowledged that he worked on the Corbin job in January and February and, on cross-examination, that he was not referred to the Bluegrass Corbin project by Local 181; and he also acknowledged that he was aware that he was not under the union contract while working there.

Russell was last operating a D-8 dozer on the Corbin project. The machine broke down. According to Russell, the (unidentified) superintendent was going to assign Russell to a D-7 dozer and lay off another operator, but

Russell told the superintendent that he wanted to take a week or two off and the superintendent agreed. Russell subsequently went home to Illinois for a 1- to 2-week vacation.

C. *The controversy over Russell's return to the Outer Loop*

1. The additional facts that are readily established

As noted, Russell appears on the Bluegrass payroll for the (nonunion) Corbin, Knox County project from the week ending December 7, 1980, through the week ending March 8, 1981. Hours shown worked by Russell during that last week are 9 regular hours and 2 overtime hours. Given that the payroll ended on Sunday, and that 8 hours more likely constituted a regular day, it would appear as more probable than not that Russell last actually worked on the Corbin project on Tuesday, March 3, 1981. On that occasion, the rear end of the dozer he was operating fell out, as he reported. It was thus as likely on March 3 that Russell elected and arranged to take a 1- to 2-week vacation while still employed by Bluegrass, as indicated by his having sought and obtained permission of Bluegrass supervision to take the time off. Russell initially did not so relate, however, on at least one later occasion he asserted, that it was even before he left on vacation that he had been told by either Patterson or Bischoff that on his return he was to go back on the Outer Loop to finish up that job. Absent specific corroboration, and on the weight of other evidence of record, I do not credit this particular recollection of Russell.

Joint Exhibit 1 shows that there were seven employees (last) employed on the Outer Loop payroll for the week ending January 4, 1981; and that they "had been working from the start of the job, or close to it." Russell was not among them. They were: Terry Hay, Allen Ayres, Jesse Ayres, *Robert Benock*, Hawley Chandler, Kenneth F. Squires, and *Bruce Kemp*. Bischoff was assigned to the Outer Loop project about the end of December or first part of January. His general recollections were that everybody at the Outer Loop was laid off for a week or so around the first of the year; that, during the (subsequent) winter months, they had "piddled" with a couple of men; that it was probably around the first of March when they really started up; and that it was along about that time that Obie Lewis was assigned as the superintendent of the Outer Loop project. Bischoff was a general superintendent at the time and Lewis' superior on the Outer Loop job.

Lewis, who at the time of the hearing was employed by Ruby Construction, was previously employed by Raymond from May 1980 through December 1981. Lewis recalled more specifically that it was about the first of February 1981 that he was assigned to the Outer Loop project. Lewis testified that at the time he was given a list of prior employees that, as far as he knew, had been working at the Outer Loop when they were laid off during the winter months. Lewis described the list as in form a record of some payroll type, or otherwise, that had contained certain named employees and, alongside the names, the certain equipment that was operated by the employees. Lewis could not otherwise identify the record used, and the referenced list (record) was not produced in evidence.

At the hearing Lewis related that he had been given such a record, or list, by either Baker or Bischoff, though in a prior affidavit given during the investigation of the underlying charge on September 29, 1981, thus much closer to the event and at a time when Lewis acknowledged that his memory was better, Lewis there recorded that it was the former Job Superintendent Baker who had provided him with the list of prior employees on the job. According to Lewis, he was told that the employees named on the list were good employees, and that he should call them. (In that affidavit, he does record his recollection of Russell's name being on the list.)

Lewis was of firm and convincing recollection that the first two operators that he called back, about mid-February to the first of March, were Robert Benock (to operate a "Back-hoe") and Bruce Kemp (to operate a D-8 or D-9 dozer). It was his understanding that both had previously worked on the Outer Loop project prior to the winter layoff; and, as noted earlier, both Benock and Kempt do appear on the (I find) last prior Outer Loop payroll evidenced for the week ending January 4, notably some 6 weeks earlier. I thus find Benock and Kemp had been laid off from the Outer Loop project for 6 weeks or more. Although Mears testified that he was not in charge of the project at the time Benock and Kemp were recalled, Mears testified without contradiction that on subsequently checking union records he had determined that both were on the out-of-work list at the time of their recall.

At the hearing Lewis testified that he recalled that Russell's name was also on the list as an operator for a front-end loader or "hi-lift"; and that his instruction was that if he needed a hi-lift operator he was to call Russell. Otherwise Lewis could not recall where Russell's name had appeared on the list, nor in what order he was eventually called back. There is major conflict and/or inconsistency in much of Lewis' testimony in regard to Russell's reemployment. Lewis, however, did testify persuasively that at the time he called Benock and Kemp back he had had no need of a hi-lift operator.

Joint Exhibit 1 also reveals that operator Garnie Ray was employed for the week ending March 15, 1981, but with the factual notation that it was for the first time (ever) Ray had appeared on an *Outer Loop* payroll. However, Mears testified without objection that Ray had reported to Mears personally that Raymond had called Ray back to work directly, and that Ray had asked Mears if it was all right to go to work. The General Counsel relies on Mears' relation that Ray worked on the Fisherville job in the fall (1980), but Mears also testified (insofar as this record shows) that Ray worked for Raymond in December, or the late fall of 1980, so he cleared Ray and put "recalled" on his card for Raymond. S. L. Figg Sr. was also employed on the Outer Loop payroll for the week ending March 22, 1981, but with the further notation that Figg worked approximately 1 week. Lewis testified that Figg was referred out as a hi-lift operator under circumstances to be discussed infra, but that he soon proved to be unsatisfactory in operating

that equipment. The hours that Ray and Figg worked in these periods are not shown on the record. Their beginning dates of employment are not precisely established.

In contrast, Russell first appears on the Outer Loop payroll (in 1981) for the week ending March 29. Joint Exhibit 1 reveals that Russell worked 40 regular hours and 6 overtime hours in that period. On the basis of the above, pertinent provisions of the contract, and other evidence of record, I conclude and find that Russell began work on the Outer Loop on March 23, 1981, as a hi-lift operator. Russell thereafter continued working on the Outer Loop, essentially, through the project's end on December 11, 1981. It is uncontested, and I find, that from Russell's initial employment in the Outer Loop project on March 23, 1981, Russell has suffered no loss of employment irrespective of any union conduct herein shown taken in his regard.

It also has been evidenced uncontestedly herein that two Local 181 member-operators had earlier "hired in off the bank" (i.e., hired into a contractor without proper clearance) in District 5, Paducah, Kentucky; that union charges were subsequently brought against the two operators for soliciting their own work; that they had been found guilty; that fines of $750 were imposed; and that the operators had thereupon paid their fines. Owen generally recalled the occurrences were approximately 18 months prior to the hearing (which would place the incidents in early 1981). In any event, Owen, through whom all charges (and fines) pass, testified definitively that the fines of Local 181 members for similar incidents of which Russell was charged had occurred prior to the Russell fine to be considered hereinafter.

Owen did not know that Russell had been a member of Local 181 in the past. More pointedly, he did not know that Russell had in fact worked earlier on Raymond's Outer Loop project, and he only knew of Russell's prior employment by Bluegrass. As to the Union's failure to have a work record on Russell, Owen could only offer in explanation that it was either misplaced or, because Russell was never previously actually referred out by Local 181, no work record had ever been generated on his clearance. (The latter would involve seemingly a repetitive error. I do not find it very persuasive as an explanation.)

Finally, the record reveals uncontestedly that it was in March 1982 that Russell for the *first* time had requested that he be, and was then, put on Local 181's out-of-work list. In April 1982, Ruby Construction by its (then) Superintendent Lewis called Mears at the hall to request a referral of Russell by name to a certain current work project. Mears testified that he turned such request over to Bland, who had previously been assigned to service that project. There is no contention advanced of any impropriety or irregularity as to the latter. The incident corroborates other union testimony that, when a business agent was assigned a particular project (area), that agent normally handled all the service requests for that project. It also evidences there was a Lewis referral request on Russell associated with both Bland and Mears. Lewis had confused recollection otherwise as to a claimed (material) earlier contact of either Bland or Mears about Russell's employment on the Outer Loop.

2. The uncontested internal union charges

It is uncontested that Mears spoke to Russell while he was working on the Outer Loop jobsite in 1981. Mears essentially told Russell that if he did not quit charges would be preferred against him for violation of certain union bylaws. It is also uncontested that, in a letter (dated April 21) addressed to the Respondent's recording and corresponding secretary Gene Marksberry, Mears preferred charges against Russell under the following subsections of article 2, section 2, IUOE Local 181 bylaws:

> (1) Failure to observe and follow customary procedures and regulations concerning assignment to work, transfer of work, or reporting in "out of work" list.
>
> . . . .
>
> (7) Refusing to comply with lawful orders of business agents or officers of the Local Union.
>
> (8) Accepting employment without the proper job clearance.

Additionally, Mears further charged Russell with "violation of Article XV, Section 3(a) of the International Constitution," which states in part:

> Members of one Local Union shall not seek employment, be employed, or remain at work at the craft within the territorial jurisdiction of another Local Union without the consent of such other Local Union.

On May 16, Marksberry notified Russell by certified letter of the above charges that had been filed against him and of his trial date thereon being set for August 4, 1981. Russell was aware of the Union's certified letter being sent to him, though Russell did not pick it up at the post office. Russell explained that he did not do so because it meant he would have to take time off from work to do so and because it was his view that a certified letter usually meant bad news. Russell testified he was not aware, inter alia, that he had been charged with having accepted employment without proper job clearance, as Mears had only told him of (1) and (7) above.

Russell did not appear for the (internal union) trial. The trial was duly held as scheduled on August 4. As complainant, Mears presented the case against Russell, but through the use of District Representative Howard Mills Jr. as witness. Mills did not testify herein.[3] Of the membership recorded present (50 at the outset and 52 at the end), the membership voted guilty, 49 to 1. Local 181's president Russell Pierce thereupon imposed the fine of $750.

On August 20, another certified letter (dated August 6) was sent to Russell by Marksberry. This letter notified Russell of the holding of the trial and its outcome, which

[3] Accordingly, I do not rely in placement of the timing of controverted events on the dates supplied by Mills, as reflected in the minutes of that trial (in evidence), certain of which appear as clearly contrary to the weight of other evidence found more convincing herein. I have evaluated other assertions therein attributed to the complainant (Mears) in the light of his testimony herein, and placed the greater reliance on the latter.

notice was (again) not picked up by Russell. The letter also advised Russell of his 30-day appeal rights, and gave further notice that upon being in arrears of paying a fine for 30 days, inter alia, "thereafter until the fine is paid no dues owed by such member can be received or accepted by the Local." Russell was in due course informed of the trial outcome by his own local, Local 841. The fine remains unpaid by Russell. Russell has not appealed. However, as earlier noted, the underlying charge was interimly filed by Russell on August 31, with complaint issuance on October 14, inter alia, alleging that the charges and fine under Russell's circumstances to be shown herein were violative of the Act.

3. The matters in controversy

a. *Preliminary observations on credibility*

There is considerable conflict and/or substantial confusion in this record as to the actual circumstances leading to Russell becoming next employed by Raymond on its Outer Loop project on March 23, and particularly so as to witnesses' recollections of a number of Russell-Raymond supervision Local 181 communications bearing thereon. At the outset it is to be observed that the charge filing and its investigation occurred essentially some 5 months after many of the material events in controversy purportedly took place, and that the witnesses were testifying at hearing some 16–17 months after the events.

While I have found Bischoff to be a generally credible witness, certain of his testimony was clearly tentative. Lewis' testimony presented major credibility difficulties of a different origin, namely, of analytical evaluation in light of his hearing testimonial description of certain incidents omitted from his prior affidavit or, in certain instances, and deemed of more serious consequence on credibility determination, of incidents and/or recollections appearing in direct conflict therewith to the point Lewis himself acknowledged that there was probable error in his prior affidavit. Lewis, as well, at the hearing, in certain instances appeared to give directly conflicting accounts. As to Russell's testimony, in certain respects it also varied to the point of creating its own ambiguities and inconsistencies, and in certain other material aspects was simply not corroborated.

Mears' testimony, in contrast, while containing less in ambiguity, was itself left somewhat the less determinatively persuasive by the limited testimony of Buchanan (essentially as a witness called by the General Counsel) and the nonappearance of either Mills or Bland as a witness at all. Nonetheless, as will be observed, other evidence, including several candid and revealing admissions by Russell, Bischoff, and Lewis, are in the end viewed substantially supportive of much of Mears' recollections of the progression of events *prior* to March 23, but not so thereafter.

In general, in resolving the various conflicts herein, I have overall evaluated all witnesses' recollections for discernment of plausible relationships that might therein reveal a common thread of a more likely progression of events. Where conflict or ambiguity nonetheless appeared to remain, I have made an effort to reflect the reasons appearing of record for the credit of the one version over another. However, to the extent other testimony of the witnesses may appear of record in conflict with facts to be found hereinafter, the same has been duly considered, but found not persuasive as being in conflict with the clear weight of other evidence deemed the more reliable, and thus to be credited.

b. *Russell's late February-early March visit to the union hall*

Russell's initial recollection was that it was before he went home to Illinois on vacation that he had gone by the hall in order to catch up on all his permits (service dues). Russell related that he believed that it was business agent Bill Bland who had informed him at that time that the service dues had gone up to $5 per week. Whether Russell visited the hall and spoke to Bland then, Russell's initial recollection that he had also paid his service dues at that time was shown clearly erroneous by convincing documentary evidence. Russell has otherwise severally recalled that he had not asked Bland to put his name on the out-of-work list nor asked to be referred out to another job, and that he had not quit the job at Bluegrass; and he acknowledged that he was still employed by Bluegrass at the time. In passing, it is to be observed that though Bland did not testify Buchanan testified that he serviced the Outer Loop job while a business representative, as he recalled it though admitting to inexact recollection, through the first or second week in February; and Mears testified he took it over *from Buchanan*, as he recalled it, approximately the first of March. I credit Mears, and I find that the Outer Loop job was serviced by Buchanan until Mears took it over.

Russell in his recalled conversation with Bland about increased service dues (compatibly) neither related that there was any discussion by him at the time of his return to the Outer Loop or that any notice was given that his employment with Bluegrass had ceased. Even assuming Russell had gone by the hall in late February, or more likely in early March, before going to Illinois on vacation and spoking to Bland, it seems more probable from Russell's own account that Russell was not then aware of a prospective nonreturn of his dozer to Corbin, discussed infra; and that Russell had not likely been, as of that time, directed to return to the Outer Loop project. At least (I find) the same is initially contraindicated as Russell did not pursue that prospect with Bland, as he later did with Mears, immediately upon his return from an interim Illinois vacation.

Mears testified (without objection) that it was after the *first* of two certain conversations that he had with Russell (the first occurring on March 12 and the second conversation approximately a week later) about Russell wanting to go to work on the Outer Loop that a union secretary had informed Mears that Russell had just paid his service dues up before talking to Mears. Upon then checking the service dues record, Mears determined that Russell had last previously paid service dues up till January (actually through December 20) before having that day paid up through February 28. Russell's service dues record, itself earlier placed in evidence by the General

Counsel, has a confirming entry of a payment by Russell on March 12, 1981, of service dues for the period covering January 5 through February 28, 1981, notably for a period covering work (I find) performed by Russell exclusively for Bluegrass on its nonunion Corbin project. Mears acknowledged that upon his review Russell's service dues record indicated to Mears that Russell had been working all along in that period.

According to Mears' recollection, during that first conversation with Russell, Russell was identified to Mears by Buchanan as being a Local 841 member. That would support, but not compel, a finding that the first Russell-Mears conversation might have occurred earlier than March 12. However, Russell had confirming recollection otherwise that he had not spoken to Mears until *after* Russell had returned from vacation, and on still other occasions acknowledged as well that he might have been at the hall in March, just after he got back from Illinois. Accordingly, I am convinced, and I presently find, that it *was* on March 12 when Russell came in and not only paid service dues for the period covering his (exclusive) Corbin nonunion work for Bluegrass, but when he *first* spoke to Mears about desiring to return to employment with Raymond on the Outer Loop project. What Russell said is unclear.

While Russell has related only one visit to the hall, with discussion thereon first with Mears and then Mills, Mears subsequently testified there were two discussions between him and Russell (the second being followed by a Russell-Mills conversation) which was not thereafter controverted by Russell. I credit Mears that there were two such conversations. I further presently find that the first was on March 12, and that it was on the second occasion, 1-2 weeks later, that Russell also spoke to Mills, even now notable as being about the time that Russell would again start working on the Outer Loop.

c. *The Russell-Mears-Mills conversations*

(1) The first Russell-Mears conversation

Russell related that after a conversation with Lewis he went to the union hall and spoke with Mears. Russell's initially recalled (single conversation) version is that he told Mears that he wanted to go back to the Outer Loop, that *they* had just switched him around, and that he wanted to go back to the Outer Loop and finish the job. Russell's initial recollection was that Mears had then said that Russell would have to talk to Mills.

Mears testified that there were two conversations he had with Russell at the union hall. On the first occasion, which Mears clarified was on March 12, Mears related that Russell came in and said he wanted to go to work for Raymond on the Outer Loop. According to Mears, Russell had not worked on one of Mears' jobs before and he did not know Russell at the time. Mills and Buchanan were present. During the conversation Buchanan identified Russell as being a Local 841 member. Mears has categorically denied that he had had a prior request from Raymond for a referral of Russell to the Outer Loop. Mears first checked the out-of-work list. Mears then told Russell that Russell was not on the out-of-work list and that, if Russell would sign the list, Mears could possibly get him out, but it may not be to Raymond. It was Mears' recollection that he had also told Russell that he had 350 members on the out-of-work list and that he would try to place Russell, but would not guarantee Russell a referral to Raymond because it might be with another construction company. Mears' recollection was that Russell had simply made no response at the time as to (suggested) entry of his name on the out-of-work list and that Russell then left the hall without getting on the list.

Russell confirmed that Mears had asked Russell to put his name on the out-of-work list and that he did not, but did not recall the statement by Mears at the time as to the number then on the out-of-work list. As Russell does not deny, and as Mears' statement accurately reflects, the existing condition of the out-of-work list, and as I find Mears to be a generally credible witness, I find it likely that Mears made some mention of the number of individuals out of work to Russell at the time. Russell has also testified that he did not place himself on the out-of-work list because (in his view) he was not out of work, as he had not been laid off. I credit Russell that he held that view. Whether he was legally justified in doing so is another question to be resolved herein.

According to Mears, it was only after Russell had left that a secretary had then informed Mears that Russell, just previous to talking to Mears, had paid up his service dues. Mears testified that Russell had not told Mears that he had been working a nonunion job for Bluegrass; nor did Russell inform Mears that he had been on vacation in Illinois. Upon report of the secretary, Mears reviewed Russell's service dues record. It was at that point that it was indicated to Mears that Russell had been working all along, at least through February 28. Mears also testified that he did not make any effort at the time to review Russell's work record. Plausibility of that aside, I am wholly persuaded in view of Buchanan's presence and prior responsibility for the Outer Loop, as well as in light of Mears' present responsibility for that project, that Mears would have been then made minimally aware that Russell had in the recent past been working some place other than the Outer Loop. Indeed, Buchanan would have been well aware Russell had not been working at the Outer Loop for some time, having been observed to have left the Outer Loop sometime in later 1980.

(2) The second Russell-Mears conversation and the Russell-Mills conversation

Mears related that it was about a week later that Russell came in again and told Mears that he would like to go to work for Raymond on the Outer Loop. (I find the latter a more likely expression by Russell in the first conversation.) According to Mears, after he told Russell the same thing, Russell then asked to speak to Mills, Mears' direct superior. Russell's version again was that he told Mears that he wanted to go back to the Outer Loop, that *they* had just switched him around, and that he wanted to go back and finish the job up. Russell recalled that they walked to the mail lobby where they found Mills. Russell's (initial) recollection was that *Mears told Mills of*

Russell's intentions of going back; this was later related as wanting to go back to the Outer Loop project. However, on another occasion, in explaining the reason that he did not sign the out-of-work list, Russell testified that he *was going back to work* at the Outer Loop to finish up the job. Mills then said, "He can't go back to work at the Outer Loop." Russell recalled that Mills opened a drawer, or something, thumbed through it, and then said, "In fact we have no record of you ever working at the Outer Loop." Russell told Mills that he was one of the first, if not the first, operator on the job at the Outer Loop. Mills repeated, "We have no record of you ever being at the Outer Loop, and you are not going back to work at the Outer Loop." Russell then asked Mills why. Mills gave no answer, but, according to Russell, went into his office and slammed the door.

Mears has again categorically denied that he had even as of this time received any prior call for Russell from Raymond. Mears recalled that Russell spoke to Mills in Mills' office. However, otherwise, Mears has not addressed Russell's above-related version of the conversation with Mills. Although I credit Mears that there were two conversations, which Russell notably did not subsequently deny, I credit Russell's version of the subsequent conversation with Mills, inclusive of Mears' opening statement to Mills of Russell's *wanting to go back on the Outer Loop project*, and Russell's specific claim to Mills, when the latter had asserted that the Union had no record of his employment there, that Russell was one of the first operators on that job. I further find it likely that it was in this second conversation that Russell had earlier told Mears that he wanted to go back on the Raymond Outer Loop job, and that *they* had just switched him around. It is inconceivable to me that the Union was not aware by this time of Russell having interimly worked at Bluegrass' Corbin job, which operated nonunion. Before addressing the plausibility of Mears' categorical denial that Raymond had requested a referral of Russell even at this time, it is necessary to address other, much conflicting evidence bearing thereon, including the nature of the offered evidence of Raymond's contact with the Union about Russell.

d. *Raymond-Russell conversations*

Though preliminarily stating that he could *not* remember exactly how it went, Russell has otherwise related that he believed the next (supervisory) discussion he had about employment was with Bischoff in March, after he had taken (time) off. According to Russell, Bischoff told Russell that when Russell returned Obie Lewis would be running the Outer Loop job, and that Russell should call Lewis. On another occasion, Russell testified significantly that he did not remember whether it was on the phone, or not, that he was (first) told to go back to work on the Outer Loop.

Bischoff related (generally) that Russell and he had touched base through the winter a couple of times about going to work in the spring. Bischoff explained that it was a common practice for *employees* to make such an inquiry about whether they were going to have a job, and where. I am not persuaded at all therefrom that Bischoff has thereby corroborated that Russell had been directed at the time of Bluegrass machine breakdown on March 3 to return to the Raymond Outer Loop job.

Though somewhat tentatively, suggestive of nondirect involvement therewith, Bischoff has nonetheless relatedly testified that circumstances were that after the machine operated by Russell had broken down it was sent to the shop for repairs, and that the dozer had thereafter been sent to a coal mine operation. Bischoff then offered an explanation as the way it happened that with Russell's machine gone from the Corbin project Russell would not be going back to the Corbin job. Although it was left unclear of record when it was known, and by whom decided, that the machine theretofore operated by Russell for Bluegrass, when repaired, would not be returned to Corbin but transferred to a coal mine operation, nor if, and how, Russell became aware thereof, I am wholly persuaded by Russell's testimony that it was not he who decided he was to no longer work for Bluegrass at Corbin.

Bischoff's only offered additional testimony relative to Russell's further employment thereafter was but indicative of a subsequent discussion between Russell and him of a different employment opportunity with Raymond. Thus, Bischoff's best recollection was that either Russell had called him, or Bischoff had called Russell, about a *possibility* of Russell working at the Outer Loop. Russell, while confirming a conversation with Bischoff, did not identify the originator of the call.

The issue of origination of the first Russell-Bischoff call momentarily aside, it is otherwise to be observed that the substance of the call as recalled by Bischoff is in content congruous with Russell's recollection that he had been then informed by Bischoff that Lewis would be running the Outer Loop job, and that Russell should call Lewis about employment on the Outer Loop job. I am in the end persuaded, and I find, that it is more probable that Russell had initially called Bischoff (who contrary to Russell's hearing recollection has testified that he was not involved in direct supervision of the Corbin job at that time). While such an inquiry on prospective work opportunity may be the normal practice of a current employee (particularly one who travels with his employer), as was credibly attested to by Bischoff, here it must be noted that Russell, whether wittingly and reasonably doing so under the circumstances or no, was last, if not still presently at the time of the call of Bischoff, an employee of Bluegrass, initially calling and speaking to a (then) supervisor of Raymond about Russell's future work opportunity, with discussion devolving to discussion of possible work opportunity for Russell at Raymond's Outer Loop.

Russell's version of (first) subsequent communication with Lewis was simply that he had reported (by phone) to Lewis that he would need the 2 weeks off, or that he would be a few days later than anticipated. The latter would appear more compatible with credited evidence of Russell's last day of employment on the Corbin job as being probably March 3 and his return and presence so convincingly evidenced in being at the union hall on March 12. Russell related that he also told Lewis that he would check with Lewis when he got back in town.

At the hearing, Lewis had a supportive recollection (at first) that he believed he had talked to Russell *one* time earlier, viz, that Russell had called him from Illinois. (In a prior affidavit of September 29, in contrast, Lewis there recorded he had no prior conversations with Russell prior to Lewis calling him back to work on March 23.) However, the hearing recollection of Lewis otherwise then was that Russell had asked him about the work status and that Lewis had probably replied that in a week or so he would probably need a hi-lift operator, but that Lewis *would have to clear Russell with the hall.* On cross-examination by the Union on this matter, Lewis then further related that Russell's inquiry at the time was as to whether the work was getting ready to start back up—or *will Lewis have anything available for him.* Lewis recalled that he replied he would have something for a 977 hi-lift in a week or so, explaining that was what Russell operated.

Although such a conversation between Russell and Lewis at this time, confirmed at the hearing by Lewis as discussed infra, has the appearance of being in direct conflict with Lewis' prior affidavit recording that he had had *no* prior conversations with Russell before calling him back to work on March 23, on the basis of the progressive background of (credited) Russell contact of Bischoff, Bischoff's corroboration thereof, Bischoff's corroborative suggestion of contact of Lewis, and Russell's own relation of such a call supporting Lewis' present recollection, I find it more probable there was such phone contact, despite the contraindication by Lewis in a prior affidavit. However, I must then also address and consider Lewis' other revealing comments on the background of that conversation that he did not then know Russell, and probably was not interested in Russell at the time. The latter admission would appear significantly inconsistent with any purported presence of Russell's name on the Baker list at this time. Bischoff did not corroborate Lewis on Russell's name being on the Baker list. Although Bischoff (I find) later discussed Russell with Lewis, it is not clear when he first did so. The above evidence does not indicate he had done so as of Russell's first communication with Lewis from Illinois.

e. *The evidence bearing on asserted Raymond-Lewis requests for referral of Russell*

Russell related that when he returned to town he checked with Lewis again, this time in person on the Outer Loop job. (Thus, this would have been a second conversation with Lewis before the March 23 recall.) According to Russell, it was on this occasion that *Lewis told* Russell that there was going to be a problem because *Lewis had talked to business agent Mears*, and Russell could not go back to work on the Outer Loop job. Russell's initial recollection was that Lewis had then asked Russell to go by the Union's office and see if he could get it straightened out or whatever. However, other Russell testimony given thereafter appears to substantially detract from that recollection in that Russell also has related that when he had (first) approached the Union he did not know there was going to be a problem because he had switched before (between Raymond and Bluegrass) and there had been no problems. I find the latter recollection to be the one as appearing far more likely under all the credible attendant circumstances that are to be revealed herein.

Lewis has not specifically corroborated Russell as to this (second) conversation with Russell at the project on Russell's return prior to Russell's visit to the hall nor corroborated a prior direction of Russell to talk to Mears *in a manner* compatible with Russell's subsequent (first) conversation with Mears on March 12. Thus, at the hearing Lewis otherwise related that he had called the hall and spoken to either Mears or Bland, and that they had informed Lewis that there was some difficulty with Russell. (Mears, in contrast, categorically denied there had been any Raymond request for Russell by name, and Mears has specifically denied he had any conversation with Lewis about Russell in March, though he did in April on the jobsite, discussed infra.) According to Lewis, he did not go into detail at the time *because he did not know Russell* and, since he needed an operator *the next day*, he had only then said, "Send me a hi-lift operator." It was Lewis' further recollection that the Union then referred Figg, who did not work out. Lewis, at the hearing, otherwise recalled that there had been something said about union dues, but then was not sure Mears had said it, nor where he got that impression.

In rather stark contrast with all the above, in the prior affidavit given by Lewis on September 29 Lewis there recorded as his earlier recollections not only that he had had *no* prior conversations with Russell before personally calling him back to work on March 23, 1981, but that he did not know if Russell had been on vacation, and thought at the time (that he recalled Russell) that Russell was just on winter layoff like everyone else on the list. Even more notably, Lewis recorded there that it was when Mears came on the jobsite about 2–3 weeks after Russell had started work that Mears in a conversation with Lewis as an aside on other matters had mentioned to Lewis that Lewis "wasn't allowed to call Russell back." Lewis there recorded also that he thought Mears may have *then* said "something about permit fees, or checking with the Union Hall." In that same affidavit Lewis significantly also related that he had then "got in touch with Russell and told Russell to get in touch with the hall and work things out." At the hearing Lewis would have the latter direction relate to an earlier conversation with Mears as claimed at the hearing. In the affidavit, however, Lewis clearly tied his own reaction and direction of Russell to the specific statement attributed to Mears as there reported made on the jobsite after Russell was employed and his contact and direction to Russell done at that time because Lewis did not want any trouble with the Union. I am led inexorably to conclude that there is major inconsistency in Lewis' hearing and prior affidavit recorded recollections.

Contrary to the General Counsel's subsequently advanced argument that Lewis has here merely omitted from the affidavit certain earlier conversations which he has now recalled and has credibly related at the hearing, it is my considered view of all the evidence that rather appearing involved are very substantial and conflicting variations in Lewis' hearing testimony, as well as both

confusing and significant departures by him from his prior affidavit. Even were it to be accepted that it is the Lewis affidavit that has contained the congeries of omission which had there served to create the misrecollections leading to present conflicting error, as Lewis himself has as much as acknowledged as probable in his explanation offered at the hearing when questioned on variances and conflict with his present hearing testimony, the same even then renders his hearing recollections necessarily the less convincing, if not to be regarded in light of other inconsistencies still to be noted fatally suspect of being simply unreliable. I conclude this is to be deemed so if not appearing well supported by other convincing and corroborative evidence.

In the present instance Lewis can draw upon no convincing corroborative support from Russell's own recollection of a report of such a Lewis-Mears conversation having been timely made by Lewis to Russell on Russell's initial return to the Outer Loop, where Russell has himself essentially later revealed that in initially going to the union hall he had not anticipated any problems. Moreover, Lewis has placed his own unclearly recalled Mears (or Bland) conversation, which led to an earlier purported report thereon and direction to Russell, only inconsistently after Russell's first conversation with Mears had occurred on March 12. While Lewis later slightly recanted to the extent of being *almost* sure he had such a prior discussion with Mears, I ultimately find that Lewis is, at best, simply mistaken, and that the more likely circumstance is that he had otherwise first become aware there was to be a problem with Russell's return not from Mears, but from a report of Russell himself, on the result of Russell's first conversation with Mears.

According to Russell, after the conversation with Mears, Russell went back to the Outer Loop and spoke to Lewis (which notably would now have been a third conversation with Lewis before Russell's recall to employment on March 23). Russell's version is that he told Lewis what happened, that Lewis told Russell that he would be afraid to put Russell to work because the Union would probably shut the job down, and that Russell then went home. Lewis did not corroborate such conversation or statement. Moreover, his prior affidavit contains the denial, "I never told Russell that he couldn't work because the union might shut us down." I presently conclude and find, on the basis of more consistent evidence, *only* that Russell did report back to Lewis the problem Russell had unexpectedly encountered when he had gone in to pay his service dues and had an unfavorable reaction from Mears when he broached being sent back to the Outer Loop job of Raymond. That circumstance was notably itself later confirmed by Bischoff as on some later occasion having been itself reported to Bischoff by Lewis, viz, that Russell had spoken to Mears, and there was going to be a problem with the Union over Russell's working for them at the Outer Loop, discussed infra. Presently I observe that the Union had not earlier assented to the nonunion company's (Bluegrass) employment of a unit employee (Russell) at the Corbin project. Nor need I overlook Raymond supervision's likely concern with factors potentially affecting the Union's continued acceptance of Raymond and Bluegrass operations as being operations by separate companies.

There is other confirming evidence that Russell had already spoken to Mears before Lewis even related he first spoke to Mears about Russell. Lewis otherwise related that he had serious dislike of firing a man, so after a few days of Figg's unsatisfactory operation of the hi-lift he had first moved Figg about on other equipment and later laid him off after about a week or two. Since the record reveals convincingly that Figg had *first* appeared on the Outer Loop payroll for the week ending March 22, and it appearing that he was sent in response to a Lewis testified need for a hi-lift operator the *next* day, Figg would have in any event not been employed (I find) before March 16 (Monday), and more probably not before March 17 (Tuesday). If Lewis' assertion of need for an operator the next day is to be credited, it is likely his call to Mears if not on Monday, March 16, was no earlier than Friday, March 13.

As it is clear beyond question that Russell was at the hall earlier on March 12 and had already spoken to Mears on that occasion about his desired return to the Outer Loop, I presently observe and find that even Lewis' account thus has Lewis calling the hall and first perfunctorily requesting Russell, and then a hi-lift operator, only after Russell's first visit and discussion with Mears. It is found that Lewis called Mears for a hi-lift operator referral only after having had the report from Russell of his earlier conversation with Mears. Even if I were to credit Russell that Lewis had mentioned to him that he was concerned about the job being shut down by the Union as the reason for Russell not being hired at that time by Lewis, there was no evidence the Union said that. Furthermore, it would then appear as incongruous therewith that Lewis would turn around and only a day or so later preliminarily ask for Russell's referral (whom he did not know) before perfunctorily generally requesting the Union to send him a hi-lift operator without any inquiry as to reason for refusal of Russell upon the Employer's request.

In contrast, Mears has specifically and categorically denied there had been any such request by Raymond (by name) for Russell's referral to the Outer Loop at the time of Mears' first conversation with Russell on March 12 when Russell first broached wanting to return to the Outer Loop. Under all the above circumstances I presently credit Mears' testimony in that respect as inherently appearing the more reliable on the weight of all the evidence presented. I am further persuaded, and I find, that, in thereafter requesting referral of a hi-lift operator and being subsequently referred Figg, Lewis had not preliminarily asked for Russell.

Standing in little better stead as reliable evidence is Lewis' additional hearing recollection indicative that it was after Figg did not work out that Lewis had (again) called the hall and told them specifically that he wanted to get Russell on the job, and that Mears had then *told Lewis* that Lewis could bring Russell on the job and there would be no harm (work stoppage) to Raymond, but Russell was not cleared to come on the job. Persuasive force thereof is lost where Lewis is only later (at the

hearing) to describe the same assurance of Mears in terms of being a report he had received from Bischoff along with Bischoff's instruction to Lewis that he should then proceed to hire Russell (directly). Apart from the instant conflicting recollections, and apart from earlier observed inconsistency with the affidavit being continued, now on a seemingly irreconcilable scale, it is moreover noted in other regard that Lewis even then contemporaneously has revealed still further inconsistency otherwise in relating, in regard to his earlier report to Bischoff on Figg's *not* working out and his need of a *different* operator, "I was informed by Bischoff *at this time*, Russell was a good hi-lift operator, get him out on the job." The evidentiary inconsistencies of an earlier Lewis request of Rears, or the Union, for referral of Russell by name as hi-lift operator mounts. There are just too many, in my view, irreconcilable inconsistencies in Russell's and Lewis' accounts to credit their accounts of a prior union refusal of a Raymond request for Russell. I conclude and find that the inherent explanation and probabilities of the events surrounding Russell's eventual employment at the Outer Loop more probably lie elsewhere.

Though Bischoff has tentatively recalled there may have been, and indeed he thought there had been, an earlier contact of the Union by Lewis about Russell, he testified clearly that he was not privy to any such contact, and specifically that he had alluded only to possible Lewis contact. It is deemed presently even more significant that Bischoff has specifically denied personal knowledge on his part of *any* prior Raymond contact of Mears about a referral of Russell to the Outer Loop. Mears has categorically denied any request received from Raymond for Russell prior to even his second conversation with Russell (about the time Russell was recalled), and has denied any conversation with Lewis in March concerning requested referral of Russell to Raymond. Although he did not specifically deny such as to Bischoff, Bischoff never testified specifically thereto. Though Bischoff at first gave the appearance of but speculatively relating that maybe Lewis had sent Russell to the hall (initially) to try to get Russell checked through before startup, the same is not only with appearance of being what more likely actually occurred if Russell was initially sent at all by Lewis, but is confirmatory of some degree of initial apprehension by Lewis (and Bischoff) about the propriety of Raymond's recall of Russell when Raymond supervision (clearly Bischoff, and more likely Lewis as well) was no doubt well aware Russell had left the Outer Loop, and had worked in the interim as an employee of Bluegrass.

Bischoff has otherwise clearly testified that *Lewis* had informed him (at some point) that Russell had talked to "Speck" Mears (Bischoff assumed), and "that there was going to be a problem with Russell working with us." If I have any remaining factfinding hesitation on this matter it is as to when Lewis first reported such to Bischoff, whether it was before any referral request was made by Lewis for a hi-lift operator or only after having proceeded on his own, and after Figg did not work out. Again, Lewis would more likely have promptly received the report from Russell's prior conversation with Mears on March 12, as Russell relates, whether or not Lewis sent Russell, given Russell's credited prior conversations with Bischoff and Lewis. By that time it is more probable than not that Bischoff would have also communicated with Lewis about Russell. Bischoff has additionally testified that in a conversation he had with Russell (though it is not absolutely clear when he had that conversation, whether initially, or at this time) he told Russell, "[W]e were going to try to get Russell on the other [Outer Loop] project," though he also testified that, in all honesty, "we tried to get somebody [first from the hall]." On another occasion Bischoff related that they did so to keep the hassle down, *and do what was right*. However, that operator did not work out too good. According to Bischoff, "it was at that point we *decided* we were going to use Russell, who is a very experienced loader." I am convinced from Bischoff's revealed desire to keep the hassle down that he was aware of Russell's report to Lewis of a problem with the Union before Lewis requested a hi-lift operator. His remark of doing what was right must be regarded as being even more revealing.

To begin with Bischoff has acknowledged that he had never seen the 12-month rule, or practice, in writing. Bischoff's initially related understanding of the rule's application was in terms of transferring Raymond employees from job to job, and being able to request an individual who had worked for Raymond in the past year and having the individual referred to a new job, *shortcutting* the out-of-work list. On the other hand, Bischoff also testified that he called individuals, members of Local 181, directly, without going though the hall. Bischoff named Mike Smith, who had worked for Raymond for 2 years, and William Clark, who had similarly worked for them off and on; and Bischoff generally asserted he was sure that there were others.

Bischoff appeared to have immediately clarified that this applied to calling individuals back, not new hires. Further, Bischoff testified that he was not saying it was his practice to do so. Nor was it done by him to intentionally bypass the Union. However, he asserted there were occasions when he had done this, and there had never been a problem before with calling somebody back who had been working for him if it was done in a reasonable amount of time. Bischoff then additionally related that the man would then probably call the Union *to let them know he was coming*, and otherwise that the business agent would know how long the man had been working for him.

As noted, however, Bischoff did not press the claim of application of the 12-month rule to Russell, but rather rested the direct call of Russell on a claimed right under the contract, viz, on the failure of the Union to have earlier supplied Raymond a *qualified* hi-lift operator upon request.

Thus, Bischoff testified that it was at the point of having first tried a loader from the hall who did not work out too good that Bischoff decided to use Russell because he knew Russell was experienced, and "I think the contract will let us do that, when we had tried a—you know, the Union has tried to furnish a member, and he isn't qualified to do the job." Bischoff related that at

that point he called and told Russell that, if he wanted to work at the Outer Loop running a 977 truckloader, he had a job because Bischoff had to have an experienced operator on that equipment. Bischoff related candidly "that's what its all about, getting operators that know how to run the equipment and get the work done; that's what he gets paid for, and what he has got to do, if he was going to keep his own job."

f. Raymond's employment of Russell

Russell has recalled (compatibly) that in the last part of March Bischoff called him at home and asked if Russell was ready to go back to work. Russell replied he was. Bischoff told Russell that he tried 1–3 operators from the hall, and they just were not meeting the standards. Russell then returned to work. Russell, however, has also acknowledged that he had returned to the Outer Loop after the Union had specifically told Russell that they would not refer him to the Outer Loop.

Lewis' version was that, after he contacted Bischoff and reported the hi-lift operator was not working out and that he needed a different operator, Bischoff had then told Lewis well go ahead and put Russell to work. Lewis related that he subsequently talked to Russell and informed him if he wanted a job he could work, but he would appreciate it if Russell would talk to the hall and try to get things straightened out because "I wanted to keep in good standing with the Union." Russell did not testify thereon.

However surfacedly plausible, I am not persuaded to selectively credit either one of Lewis' related, but seemingly conflicting, assertions of a prior Mears assurance that employment of Russell would not reflect on Raymond as Lewis related was first given to him, and then to Bischoff by Mears and reported to him by Bischoff, where neither Bischoff nor Mears support either version, and especially where there are essentially similar conversations attibuted to Mears by Bischoff and Lewis related as occurring later, after Russell was already on the job.

Though Lewis acknowledged that he offered employment to Russell regardless, I am persuaded that a Lewis present request made of Russell was the more likely occasion for Russell's return to the hall and his second conversation first with Mears and then with Mills, which as earlier found was to no avail in obtaining a union clearance. I am persuaded that Russell at that time made clear his claim to the Union that he had worked on the Outer Loop before, and that he wanted to return there. Russell was told by Mills that he could not do so without reason given other than as an aside that there was no record of his working there. There was no evidence offered that he was told he could not return there because Raymond had not requested his referral, nor because he was not on the out-of-work list, nor because it was the Union's view that he had solicited his own employment with Raymond.

It is, however, found that in the first conversation that Russell had with Mears on March 12 Russell was told by Mears that he should sign the out-of-work list. Russell elected not to do so at that time (I find) because it was his view that he had not been laid off. In short, Russell viewed his assignments whether received from Patterson or Bischoff, and whether for Raymond or Bluegrass, as one continuing employment. I am further persuaded that Russell did not sign the out-of-work list on his second visit to the hall and discussion with Mears and Mills because Russell already knew that he was going back on the job regardless, and he was there trying to get union clearance pursuant to the request of Lewis. I conclude that Russell's reference to his "intentions," though ascribed initially to Mears' summary made to Mills, was but revealing of that actual circumstance as was his other testimony, "I was going back." Russell returned to work on the Outer Loop on Monday, March 23. I find it likely that the Russell-Mears-Mills conversation occurred on Friday, March 20, noting by that time that Figg had been employed about a week, and noting also the circumstance that he actually started working the following Monday, March 23.

g. Post-March 23 events on the jobsite

Lewis related at the hearing that it was during a later conversation he had with Mears on the jobsite about disrelated (Teamsters) union problems that Mears had initially mentioned to him, as an aside, that Russell should not be working there or something to that effect. (In a prior affidavit, as earlier noted, Lewis had recorded prior recollection that Mears had told him "that I wasn't allowed to call Russell back.") Although Mears on one occasion testified that he had only told Bischoff and Lewis that he wanted to see Russell, on another occasion he acknowledged generally that he had told Lewis that the employment of Russell by Raymond was going to cause some trouble with the Union. In this instance, I credit Lewis that in substance and effect Mears told Lewis on the jobsite that Russell should not be working there, and that it was going to cause some trouble with the Union.

Bischoff recalled that it was not long after Russell was put on the job that he had a conversation with Mears about Russell. According to Bischoff, on that occasion Mears told Bischoff that Russell was going to become a problem in the way of maybe Russell being fined. Bischoff's recollection was that Mears then asked Bischoff if there was a way "we" (Raymond) could work Russell somewhere else because it would save everybody a lot of headaches. Bischoff testified that Mears also told Bischoff that Russell was working in front of several Local 181 members who were on the out-of-work list. Bischoff told Mears he really did not have any desire to take Russell off the loader because Russell was doing a good job on it.

Bischoff otherwise testified that Mears had not threatened Bischoff, nor had he insisted or said anything about Russell's employment on the job, but merely had alerted Bischoff that working Russell was going to become a problem in the way of maybe Russell being fined. Bischoff related that he also told Mears that Mears had a job to do, and to do whatever he had to do; and that Bischoff had to build this job, and was going to do whatever he had to do to build it.

Russell related that it was after he was on the job a week, though acknowledging that he did not remember the exact time, that Mears came to the jobsite and drove

his car up to where Russell was running the machine. Russell recalled that he shut the machine off, but did not immediately get off, telling Mears that Bischoff had said that, if Mears wanted to talk to Russell, Bischoff would like to be present. Mears replied that Bischoff did not need to be present; Mears wanted to talk to Russell, and it would only take a minute.

Russell related that he then got off the machine and walked over to Mears' car, with Russell and Mears repeating their above statements. According to Russell, Mears then told Russell, "We want you off the job." Mears said, "Russell, I don't have a thing against you, but I've got a boss, just like you have, and my boss wants me to get you off this job. I'll give you two weeks to quit. If you don't, I'll have to prefer charges against you."

Russell then asked Mears what he had done. Mears brought a book out and circled (only) "IUOE Local 181 Bylaws (1) and (7)" (as earlier related), but not (8) in regard to "accepting employment without the proper job clearance." According to Russell, he then inquired if he could ask Mears one thing, and, with Mears' assurance given, Russell asked Mears, "Will you treat me just like you do everybody else in this Local?"[4] Russell related that Mears replied, "Yes, sir, Russell, I'll promise you that." Russell said, "Then you might as well go on and prefer your charges, because I'm not leaving the job."

Mears' version is that he had received a call from one of his operators the day before that Russell was on the job, and he went out on *April 20* (Monday) to check it out. He asked Lewis if he could talk to Russell and received his approval (corroborated by Lewis); he then went to Russell on the jobsite where he was running a 977 hi-lift. Mears' version is that, after Russell got off the tractor and came to Mears' car, he told Russell that he was forced to bring charges against Russell, handing Russell a copy of the bylaws book with the charges he was going to bring against Russell. Mears did not specifically dispute Russell as to what was then noted as the charges to be brought. Mears told Russell he did not want to do it, as he did not like to put a mark on anyone's record, and that if Russell would leave the job by the following Friday or Saturday, whenever the week ended, he would drop all the charges. According to Mears, Russell did not tell Mears that he was not going to leave the job, but rather said nothing in reply; and Mears simply got in his car and Russell back on his tractor.

Mears did acknowledge that he had told Russell that he had nothing personally against him, and that he had also told Russell that he had a boss just like Russell had. Mears acknowledged that he had discussed the charges he brought with Mills, but denied he told Russell that his boss wanted Russell off the job. Whether Mears specifically told Russell that his boss wanted Russell off the job, I find that was the reasonable import of his reference to having a boss in the same conversation in which he had urged Russell to leave the job. The same is sufficiently supported by Mears' acknowledged discussion of the charges with Mills and Mills' eventual involvement in the presentment of the case as a witness at Russell's trial. I credit Russell generally on this conversation (with the exception as to being given 2 weeks, rather than 1). I credit Russell that Russell told Mears he was not going to leave the job. I find it was reasonable for Russell to conclude from what Mears told him that it was Mills who wanted him off the job. I further find that at that time he had not been informed that charges to be brought would include a charge of his not having had proper job clearance, though I hasten to add the conclusion that he was later served with legal notice thereof though he did not pick up such notice from the post office.

Lewis compatibly recalled that, after Mears had gone over to speak to Russell, Lewis went down to them. Lewis recalled that Mears said something to the effect it was just between him and Russell, and Raymond did not have anything to worry about. Lewis heard Mears then tell Russell, "[I]f you're not off the job by Friday, I'll have to press charges." Mears also told Lewis, "Obie its nothing to do with Raymond, but Russell, if he's not off the job we're going to have to press charges against him."

Mears had otherwise testified that the sole reason he subsequently brought the charges against Russell was because Ruseell had violated the articles in the bylaws and constitution by soliciting his own job, and that Mears knew Russell had solicited his own job because at the hall Mears had told Russell he could not refer him to the Outer Loop, and after that Russell was found working on the job. Mears testified that was the only reason, and the fact that Russell was a member of another Local did not influence him in bringing the charges.

h. *The Building Agreement's 12-month clause and the related procedures, practices, understandings, and arrangements under the Highway Agreement*

(1) Preliminary analysis

The beginning frame of reference is that which is alleged and uncontested herein, viz, that the Union, under the Highway Agreement, contractually operates an exclusive hiring hall whereunder a signatory employer such as Raymond has agreed to extend its employment preference (exclusively) to qualified individuals who are to be nondiscriminatorily referred out by the Union to the employer consonant with employer's need and upon the request of the employer. An immediate distinction as to practice, understanding, or arrangement thereunder arises in respect to the continued employment of current or preferred employment of former employees of a signatory employer.

[4] Russell did not explicate specifically what he meant by that statement. Russell did relate on one occasion that Benock was transferred to Corbin and worked there a week or two before returning to the Outer Loop. However, on this record, it appears that Benock was on the Outer Loop payroll from his start on the Outer Loop through the winter shutdown payroll ending January 4, before recall and return to the Outer Loop in the period mid-February to first of March. In short, it was at best left unclear as to what period of time Russell there referred to, and otherwise was indicated as occurring, if at all, some time after the material events herein had already taken place. In any event, there is no evidence Russell brought that contended circumstance to the attention of the Union, or that it knew about it and treated Russell disparately.

The Highway Agreement specifically provides that a signatory employer will notify the Union "when new, additional, or replacement employees are needed." It is a common practice thereunder, upon start of a new project within Local 181's recruitment area, usually (but not always) prior to actual startup of the job, e.g., at a prejob conference (as is contractually provided for upon union request), for a signatory employer to request and (usually) to be granted by the Union a clearance of key employees whom the signatory employer desired to bring to the new job.

Business Manager Owen has compatibly related that a member of Local 181 as an employee could travel with his employer anywhere in Local 181's jurisdiction. Seemingly, awareness of the required employee willingness to transfer presupposes employer-employee discussion of prospective work opportunities by current employees of a signatory employer. I find that was the practice, and that it was not viewed as constituting solicitation of a job when accomplished by a current employee. Mears testified even more broadly that it was not required that an individual (already) employed by an employer sign the out-of-work list unless there was an actual break in his employment with that employer. Thus, if an individual already charged to an employer took a vacation or was (temporarily) laid off by that employer but did not place himself on the out-of-work list, the individual did not have to tell the Union anything. The individual was free to go back to his employer because he was originally charged to that employer, and had effectively remained that employer's employee.

However, Mears testified that if an employee was *terminated* by a signatory employer or was no longer working for that employer, the individual had to then sign the out-of-work list. (The individual could readily place himself on the out-of-work list simply by reporting to the Union, either at the hall or by phone, that the individual was out of work and seeking employment.) Consonant then with the individual's position on the out-of-work list, his equipment qualifications, and personally designated district availability, the individual had to be thereafter referred out in order (on a first-in, first-out basis) to the individual's next employment with a signatory employer in Local 181's recruitment area. The individual could not solicit employment (with a signatory employer) on his own. Nor could the individual effectively request referral to a project to be selected by the individual. The above describes the basic integrity of the exclusive hiring hall.

A second distinction of practice, understanding, or arrangement applicable to the operation of the exclusive hiring hall concerns an employer's ability to nonetheless extend a preference in employment opportunity to certain *former* employees of the signatory employer. Owen testified credibly that there is a (written) clause in the Building Agreement whereunder a signatory contracting employer was allowed to request but not hire (that is, the employer had a right and privilege to request referral by the Union, but not to hire directly without going though the hall) an operator by name if that individual had worked for the signatory employer within the prior 12 months.

Owen testified that a similar practice existed under the Highway Agreement, viz, that an employer signatory to that agreement (materially herein, Raymond in road construction) could request referral of a former employee, employed by it within the prior 12 months, who would then be referred by the Union, but only if that individual's name appeared on the out-of-work list. Mears confirmed that there has been a practice established for as long as he has been there that an employer could request an individual who had worked previously for the employer in the past 12 months, and that that individual would be referred to the employer irrespective of the individual's position on the out-of-work list. Owen, however, relatedly testified that an individual so requested by an employer would *not* be referred by the Union if his name did not appear on the out-of-work list. Owen's explanation for this requirement was generally plausible that, if the man did not report to the Union and place himself on the out-of-work list, the Union would not know he was unemployed and seeking work. Mears confirmed that, if an employer requested an individual who was not on the out-of-work list, Mears would not refer that individual to the requesting employer, and, according to Mears, also that that was a universal practice throughout the Local. According to Owen, in *every* instance where a man has been *referred* by the Union, he was on the out-of-work list. (Materially herein, Mears confirmed that Benock, Kemp, Ray, and Figg were each and all on the out-of-work list; and it is uncontested that Russell never placed himself on the out-of-work list in 1981.) At the time of such referral, an appropriate entry is then made on the existing work card of the individual as to the particulars of the referral to the given employer and the equipment to be operated.

Bischoff has acknowledged that Raymond's basic obligation was to go to the Union for hiring, and he testified that they do hire through the Union as much as possible the required qualified persons referred out for the operation of their certain pieces of equipment. Bischoff's additional testimony that Raymond from time to time has continued in employment over the years certain employees willing to transfer was consistent with union testimony as to practices covering continued employment of current employees, whether or not members of Local 181. Although Bischoff had never seen a 12-month rule on paper, Bischoff testified generally that he had a good relation with the Union, and that he had never had a prior problem with calling somebody back who had been working for Raymond if it was within a reasonable time, excluding one who was in arrears of dues.

Both Bischoff and Lewis have described certain occasions when they have called back former employees without notifying the Union directly. However, Bischoff's testimony thereon clearly was of but occasional incident and limitedly to recall of former (seemingly only regular) employees to new jobs. Moreover, Bischoff was also aware of the probability that the individual would subsequently call the hall and let the Union know they were coming. Lewis has compatibly testified that he tries to make it a habit to call the hall and inform the Union that he is putting a laid-off employee back to work, and

he clearly excluded that procedure from application to a new hire. Lewis thus has related (e.g., in respect to seasonal shutdown or layoff) that he has called operators directly before calling the Union. Usually when he has done so, it is after hours and he needs the operator the next day. According to Lewis, most of the time (9 of 10) he will call the hall the next day, and notify the hall that he has done so, though he also acknowledged that he probably does not do it all the time. It is clear that Lewis' description of an occasion where he had failed to call the hall and notify them that he had called an individual back to work was an exception through negligent omission, not an employer claimed practice nor a regular practice shown accepted by the Union.

Lewis acknowledged he had called Benock and Kemp directly. Although he could not attest with certainty that he had later notified the Union, he testified that he believed he had, and the Union offered no evidence that he had not. The Union concedes he did on brief. Lewis also called Ray directly, and on this record, apparently, did not subsequently notify the hall. However, Ray subsequently did, and Ray was shown to have been referred by Mears under circumstances earlier related.

More to the heart of this case, Owen confirmed that there were occasions in his experience as a Louisville business repesentative when the Union was not notified either by a signatory employer or by an employee-member of a direct recall of the individual by the former employer. On such an occasion (when the Union learned of it) similar appropriate entry would be made on an existing workcard. (In short, aberrations were processed in accordance with practice.) Mears testified in further explanation of how the practice normally operated, internally, that, if an employee placed himself on the out-of-work list (as seeking work) and an employer then made a request for the individual as an employee who had worked for that employer within the past 12 months, or if an employer recalled such an employee directly and the individual reported the recall, the individual was referred (if appropriate) and the notation was placed on the individual's workcard "recalled" to the particular employer. (This is what Mears testified he did on Ray's report of Raymond's recall.) But Ray's name was on the out-of-work list.

There was one additional internal union practice. Thus, in circumstances where the individual was presently on the out-of-work list but had in the interim from qualifying employment with a requesting employer worked for another employer, Mears would regularly ask the requesting employer to send a letter delineating the request. (Buchanan, a witness of the General Counsel, essentially confirmed this, but revealed a broader personal practice on his part, viz, to ask for a letter on every employer request of an individual by name to cover himself.) Mears testified that upon receipt of such a letter he would then refer the man irrespective of the individual's position on the out-of-work list. Finally, Owen acknowledged that there probably have been still other occasions where an employer has hired an out-of-work operator directly, without (it) going through the hall, but such would have been accomplished without his knowledge. I find the testimony of the above union officials as to the practices attendant to, and those utilized in, internal control of the operation of an exclusive hiring hall are essentially mutually consistent, corroborative, in themselves nondiscriminatory, and not convincingly contraindicated by evidence submitted by the General Counsel. I credit the same.

(2) Analysis, conclusions, and findings

At the outset the General Counsel has conceded on brief that all the allegations of the instant amended complaint would fail if the Respondent is found to have followed its referral system in a nondiscriminatory manner. I agree with that candid evaluation. Thus, the General Counsel has appropriately conceded the Union can lawfully subject a member to union discipline (e.g., a fine) for seeking his own employment (from a signatory employer) and accepting a job without first clearing his employment with the Union under the existing contractual provisions and understandings lawfully governing that clearance. Cf. *Cement Masons Local 526 (P. J. Dick Contracting)*, 261 NLRB 1050, 1053 (1982); and the Respondent would have it similarly appropriately observed that the Union may lawfully hold both employers and individuals using an exclusive hiring hall to the terms of the contractually prescribed exclusive hiring hall and to a compliance with its established lawful practices and procedures. That includes the propriety of the Union's directly seeking, indeed, its ability to insist upon, an employer's removal of an offending individual from scheduled employment, as well as the propriety of the Union's direct approach of the offending individual thereon for attempt to secure a voluntary corrective action. Cf. *Birmingham Country Club*, 199 NLRB 854 (1972). In short, the Union need not tolerate a bypass of its exclusive hiring hall, but may lawfully take steps to defend its integrity. Indeed, in the operation of an exclusive hiring hall an incumbent duty has devolved upon the Union to actively police its operation in a nondiscriminatory manner. Thus, for the Respondent to have knowingly permitted Russell to breach the existing contract's hiring hall provisions to the disadvantage of others properly using it, the same would appear, as is argued by the Respondent, to itself (at least tend) to convict the Union of unfair, invidious representation of others using the hall, whether members or not. Id. at 857; and cf. *Ironworkers Local 433 (AGC of California)*, 228 NLRB 1420 (1977), enfd. 600 F.2d 770 (9th Cir. 1979), where dispatch by referral of individuals who were not on the out-of-work list in violation of hiring hall procedure was carried to extreme; and see the same generally for other forms of illegal "back-dooring."

However, there is also no question that the Union is prohibited by the Act from engaging in disparate treatment of an out-of-local member (on a non-local-union-membership basis) who otherwise has qualified for referral under existing nondiscriminatory criteria of the hiring hall. Cf. *Sachs Electric Co.*, 248 NLRB 669 fn. 3 (1980), enfd. in relevant part 668 F.2d 991 (8th Cir. 1982). Moreover, once an individual is to be deemed lawfully on the job, as when the union has been unable to refer upon request within the time specified by a contract and the em-

ployer has properly hired the individual, the union may not thereafter seek removal of the individual in a manner not contractually (and nondiscriminatorily) provided. See *Operating Engineers Local 302 (Associated Sand)*, 241 NLRB 737 (1979). There the Board observed that, since a union did not fill the employer's request within the contractually provided 48 hours, the individual employed thereafter in the job was properly on the job and not removable at union insistence without violation of Section 8(b)(2).

In the instant case, however, there is no time limitation stated in the contract. The Employer is expressly given only unqualified right to evaluate the qualifications of an operator when referred. Bischoff claimed the seemly related right of Employer to hire directly (without going through the hall) when Figg, referred earlier by the Union, was evaluated by the Employer as unqualified. In regard to allegation of the Respondent's subsequent attempt to cause Raymond to discharge Russell in violation of Section 8(b)(1)(A) and (2), no specific contention was advanced by the General Counsel independently on the latter account, viz, that Russell was then properly on the job because the Union had failed earlier to refer a qualified hi-lift operator. It is observed that the contract's exclusivity referral provisions on their face applied to "replacement employees." Moreover, the Union does contend that Bischoff had called Russell to work (improperly) without checking with the Union to determine if any problem still existed, and specifically does contend that Russell subsequently accepted his employment with Raymond without proper clearance. It is observed that in connection with Russell's initial employment on Raymond's Hindman job, where the Union had not then been able to timely supply Raymond's operator needs, a subsequent clearance was nonetheless indicated as required, though assurance of clearance, under those circumstances, was given Raymond in advance. In that respect the Union may hold employees to a compliance with established practices built on reasonable interpretations of the hiring hall contractual arrangement. *Teamsters Local 525 (Nelson Construction)*, 193 NLRB 724, 725 (1971).

While the Union may not misuse an exclusive hiring hall operation by actually seeking to externally enforce (i.e., by affecting individual employment) its internal union rule, or regulation, unrelated to monthly dues (including share of expense of dispatch hall), cf. *Longshoremen ILWU Local 13 (Pacific Maritime)*, 228 NLRB 1383, 1386 (1977), enfd. 581 F.2d 1321 (9th Cir. 1978), there is simply no question now raisable that the union may not lawfully insist and require an employer to correct a discerned circumvention of the lawful exclusive hiring hall provision and practice with a compliance to be brought to bear directly on the individual's employment, i.e., by a termination of the employment of the offending individual, unless the same be otherwise shown to be accompanied by a specific act of discrimination. *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961); *Hellenic Lines Ltd.*, 228 NLRB 1, 4 (1977). Finally, it is observed that a union's refusal to deal fairly with an individual's request for job referral information breaches the union's duty of fair representation, and is violative of Section 8(b)(1)(A) of the Act, *Operating Engineers Local 324 (AGC of Michigan)*, 226 NLRB 587, 597 (1976), and that a union's refusal to refer an individual because he had performed nonunion work violates the Act, *Iron Workers Local 751 (Red-E-Steel Co.)*, 193 NLRB 665, 669 (1971).

The ultimately dispositive legal question applicable to the facts when found is one simply, and succinctly, stated. Did the Respondent in its treatment of Russell follow its exclusive referral system in a *nondiscriminatory* manner, and did it fairly represent Russell in doing so? (The question is but additionally complicated by the effects of the "double breasted" operation in which Russell was involved, and the resolution of the arguments made in that context.) If it did and Russell was improperly on the job thereunder, it is clear from the above authorities the Union could lawfully approach Raymond to seek Russell's complete discharge (let alone suggest, as it did here, a transfer of him elsewhere to keep headaches down). The Union could as well seek of Russell his own voluntary removal, and, failing that, invoke its own internal union disciplinary process, all in defense of an attack upon the operation of its exclusive hiring hall.

The General Counsel has firstly contended that, sometime in March when Raymond attempted to apply a practice claimed as existing under the exclusive hiring hall whereby Raymond would be permitted to rehire Russell as a former employee employed by Raymond within the past 12 months without regard to the Respondent's out-of-work list, the Respondent, in violation of Section 8(b)(1)(A) and (2) of the Act, prevented Raymond from employing Russell by refusing to refer him on Lewis' request, which conduct of the Respondent it is contended has resulted in a loss of employment by Russell for the period March 9–20.

To establish his contention of an unlawful nonreferral, the General Counsel must rely on the first call to the Union, as attested to by Raymond Superintendent Lewis, as made by Mears (or Bland) containing his initial request for a referral of Russell, and an argument that the Respondent's refusal to refer Russell has both been sufficiently and credibly evidenced by Lewis' recollection of a statement being made at time of inquiry about Russell that there was some union difficulty with a referral of Russell. Though Lewis admitted he did not go into detail, and though it is uncontested that Russell was not registered on the out-of-work list at the time, the General Counsel's argument is that Russell, having been in fact employed by Raymond in the past 12 months, was then qualified under the existing practice to be referred to Raymond, on Raymond's request, without regard to the out-of-work list. The General Counsel argues that the Union's refusal of the Lewis request at the time made was thus a wrongful departure from the existing practice, and occasioned an unlawful loss of employment to Russell in the period March 9–20. The General Counsel would base the loss period solely on a consideration of the period of Ray's and Figg's employment. The General Counsel would further rely on Lewis' testimony as to a second request made by Mears for a referral of Russell by name, and contends in that regard that though the Union at that time gave Raymond notice that Raymond

could bring Russell on the job without a work stoppage, the Respondent nonetheless had continued to wrongfully deny Russell a clearance.

Despite the clear omission from Lewis' prior affidavit of the above (indeed all) Lewis reported conversations with the Union about a Russell referral before Russell's employment on March 23, the General Counsel would nonetheless have Lewis' recollections thereof as now related at the hearing, credited, with an urged reliance on *Federated Department Stores*, 207 NLRB 1005 fn. 5 (1973). Apart from the earlier observed inconsistencies and chronolgical difficulties encountered with Lewis' hearing recollections (in significant part vis-a-vis prior affidavit recollections recorded) which have led to the conclusion that Lewis' presently related accounts must be concluded as unreliable recollections herein unless supported by other convincing and credible evidence of record, I would only further observe in passing that Mears (though not Bland) has, contrary to the indicated circumstances present in *Federated Department Stores*, supra, in fact also testified and denied any and all such March conversations with Lewis about a Russell referral.

The General Counsel alternatively contends that under other existing practices Raymond did not have to call the hall in calling Russell back, as Raymond had not always in the past called the hall when calling former employees back to work on either a new job (Bischoff) or back from winter layoff (Lewis). The General Counsel appears to have also alternatively contended that Raymond was allowed to transfer Russell from one job to another as it had previously done so in the past with other individuals who were members of Local 181. (The argument based on contended application of a transfer practice would appear to have either overlooked the established interim employment of Russell by Bluegrass at Corbin, or would appear otherwise to indicate a contention being advanced by the General Counsel that a Raymond employment of Russell was in some manner to be viewed as to have been uninterrupted by the Bluegrass employment, and thus to have subsumed an issue of base for transfer apparently resting on a view of single employer status of the two companies.)

It is also contended by the General Counsel that Russell did not have to sign the out-of-work list because he was never laid off; but, even if he were laid off, an individual did not have to be on the out-of-work list to be cleared by the Union to a job, with stated reliance on Buchanan's earlier clearance of Russell to Bluegrass' Fisherville project and on the basis of contended admissions of Mears to that effect. Finally, it has been urged by the General Counsel that Russell's prior employment at the Bluegrass nonunion Corbin project should have caused the Union no concern as Ray had worked on the Bluegrass Fisherville project, and on a Raymond direct recall, on check with Mears, who had it approved.

The General Counsel has essentially contended that it was because of the number of Local 181 members who were out of work at the time, and because Russell was not a member of Local 181, that the Respondent has refused to apply its existing referral practices to Russell in a nondiscriminatory manner. In that respect, it would appear as significant that the General Counsel has not advanced argument at the hearing, or on brief, that Russell was not referred because Russell had interimly worked on the Bluegrass nonunion Corbin project while Local 181 members employed at the Outer Loop had been laid off by Raymond for 1-2 months. In that connection, it is clear Russell had taken that assignment to Corbin a month earlier; and Mears' account that he did not become aware that Russell had been working all along (in January and February) until after he had already declined to refer Russell is credited, including that Russell did not earlier tell him on that occasion where he had been last working, nor did Mears under the practice have the need to ask.

The Respondent's basic contentions are, in general, that it is lawful for the Union to have a system of exclusive referal that is to be utilized in a nondiscriminatory manner, and that it is part of the Respondent's duty thereunder to police not only the actions of employers, but also those of its own members and others who use the exclusive hiring hall. The Respondent acknowledges that there were a substantial number of its members out of work as of March 1981. The Respondent denies that it has discriminated against Russell because he was not a member of Local 181, but of Local 841, and in that respect points effectively to the background of its prior regular clearances of Russell on prior work projects within its jurisdiction when it was appropriate for it to do so. The Respondent specifically contends that it had properly refused to refer Russell to the Outer Loop on the occasions when Russell requested it, and in that regard contends that Mears' testimony should be credited (over Lewis) that Raymond had not asked for a referral of Russell by name on the occasions when Mears had refused to refer Russell.

The Respondent has also denied it subsequently attempted to cause Raymond to discharge Russell resting on a claim made on brief that the General Counsel presented no evidence to controvert the testimony of union witnesses that the Union never asked Raymond to *discharge* Russell. However, in this instance I credit Bischoff's testimony that Mears not only alerted Bischoff that Russell was going to become a problem in the way of maybe Russell being fined as he was working in front of several Local 181 members who were on the out-of-work list, but that Mears also asked Bischoff if there was a way Raymond could work Russell somewhere else because that would save everybody a lot of headaches. As the Union's conceded complaint was of Russell's working on the Outer Loop without proper clearance, I conclude and find that Mears thereby had effectively requested Bischoff to remove Russell from the Outer Loop project, albeit unsuccessfully. It is apparent that Mears, after also unsuccessfully urging Russell to voluntarily remove himself from the job, did prefer charges on May 6, following which, in due course, Russell was subsequently found guilty, inter alia, of soliciting his own employment and accepting employment without clearance, and fined $750 by the Respondent. However, the Respondent then further contends that the action the Union has taken this time against Russell was necessary to further legitimate union interests, and to carry out its repre-

sentative responsibilities in a fair and evenhanded manner. The Respondent advances as being of significant bearing in the latter regard, again effectively, that the Respondent had already policed similar actions of its own members in the recent past. (At the hearing the General Counsel contracontended that there was an inadequate showing made that the circumstances of the two individuals, who were earlier charged and fined in Paducah for soliciting their own work, were similar to those related to Russell.)

Relying on Mears' testimony, Local 181 firstly contends that Raymond did not make any subsequent request of the Union that it refer Russell. The Respondent relatedly urges that credit should be given to Mears' consistent denials in that matter over Lewis' contrary assertions, especially so on the basis of the (noted) absence from Lewis' prior affidavit of the now related Lewis calls. On this record I find the Union's argument wholly persuasive insofar as any Raymond approach of Mears by Lewis is raised. Although there was initially alternative recollection by Lewis of having the first conversation with Bland, Lewis (albeit reluctantly) receded from even that view. The weight of other evidence of record is also contraindicative.

On substance of the first allegation otherwise, the Respondent centrally contends that Bluegrass is a separate company from Raymond. Raymond has contracted to perform all its projects union. The work performed by Russell on the Bluegrass Corbin job was not under any project agreement with the Union. The Corbin work performed by Russell thus cannot be construed as work being performed for Raymond. Despite any contention of the General Counsel to the contrary, I find myself wholly persuaded by the Union's previously followed, and presently declared, view of separate work project identity of Bluegrass vis-a-vis Raymond. I conclude and find that the Bluegrass nonunion Corbin project work may be viewed by the Union as not being Raymond work under seeming existing Board precedent. Cf. *A-1 Fire Protection, Inc.*, supra. Moreover, despite the single-employer status of Raymond and Bluegrass, Bluegrass' separate operational identity would appear not shown later forfeited or amalgamated with that of Raymond by virtue of the Union's earlier separate and single Fisherville project agreement made with Bluegrass, albeit Bischoff at one point in the record had made an ambiguous reference to its being operated under Local 181 jurisdiction. Although not assented to by the Union, the individual reassignment/transfer of Russell is not deemed sufficient to call for a different result.

The Respondent's related argument is that Russell was effectively separated from his prior regular employment status with Raymond on the Outer Loop when Russell went to work for Bluegrass at the Corbin project; that Russell was thereafter no longer to be viewed as "charged" to Raymond; and that consequently Russell, under the existing practice, was not free to go back to work for Raymond either on a Raymond direct call or on his own. Rather, Russell was then required to be referred back to Raymond through the hiring hall before again accepting employment with Raymond; and Raymond, for its part, had to first request the Union for a referral of Russell, with Russell registered on the out-of-work list. Neither hiring hall procedure was followed. Raymond did not request Russell's referral; and Russell had not signed the out-of-work list at time of Raymond employment, and was not referred. (Indeed, the Union's practice in that situation would be to require a letter from Raymond specifically requesting a referral of Russell by name.) There is considerable merit in Respondent Union's above contentions.

Thus, on the record made before me I cannot find that the Union has taken an unreasonable position in viewing Russell's employment status with Raymond substantially altered by his acceptance of subsequent employment with Bluegrass; and I do find the Union's contentions as to the hiring hall requirements then applicable to Raymond and Russell for a subsequent referral of Russell to Raymond as fully supported by the record evidence. First it would appear to readily follow as reasonably correlative to prior Board view of separate units in *A-1 Fire Protection, Inc.*, supra, applicable to "double breasted" operations, that, in accepting an assignment to work with the separate Bluegrass company at Corbin during the week ending December 7, at a time when from all appearances herein operator work had continued at Raymond's Outer Loop, the Union upon learning of it might reasonably view Russell had ceased his employment with Raymond at the point of beginning employment with Bluegrass. Thus, Russell would properly be regarded by the Union as no longer occupying current employee status with Raymond or, in instant hiring hall terminology, properly no longer be considered "charged" to Raymond. I conclude, and find, it was a reasonable and an appropriate interpretation of its hiring hall arrangement for the Union to later take and maintain the position that there had been a break in Russell's employment service with Raymond by his acceptance of employment with Bluegrass. Russell thus thereafter occupied the status of being a *former* employee of Raymond. I conclude that the General Counsel's arguments based on a practice precedent that would be applicable to a current employee of Raymond in regard to transfer from job to job, or direct call to a new job, is inapposite.

The Union has contended that there are clear deficiencies shown in regard to the General Counsel's separate (amended) allegation of a loss of employment by Russell in the period March 9–20. The Union argues that, even if it were to be found that Lewis did call someone from the Union other than Mears, and that on that occasion Lewis was told by someone that there was a problem with a Russell referral, the Respondent then contends, *firstly*, that it has not been established from Lewis' and Bischoff's testimony definitively when Lewis had called that individual. *Secondly*, Russell was not in a posture for a referral to Raymond anyway as he was not then on out-work list. (A *third* argument advanced by the Union that Raymond had called Russell back when it wanted him, without even checking with the Union about the nature of any problem that did exist, is not found persuasive, and is rejected.)

As noted, it was contracontended by the General Counsel that Russell did not have to sign the out-of-

work list because he was never laid off; but, even if he were laid off, an individual did not have to be on the out-of-work list to be cleared by the Union to a job, with stated reliance on Buchanan's earlier clearance of Russell to Bluegrass' Fisherville project and on the basis of contended admissions of Mears to that effect. The latter two arguments are readily resolved against the General Counsel: I have earlier credited Buchanan's account (seemingly itself supported by Russell) and found that Russell was already on the Fisherville job employed by Bluegrass when he was cleared in accordance with common practice as an employee that Bluegrass desired to retain on the Corbin project when it became subject of special project (union) agreement. Contrary to the General Counsel's contention, Mears has clearly testified otherwise that, after an employee had a break in employment, as when terminated or when no longer working for an employer, an individual had to be registered on the out-of work list to be thereafter referred to that employer under the 12-month prior employment practice. The General Counsel's additional argument that Russell's prior employment at the Bluegrass nonunion Corbin project should have caused the Union no concern as Ray had worked on the Bluegrass Fisherville project, and on a Raymond direct recall, on check with Mears, who had it approved, is without merit, as I have found the underlying facts to be otherwise.

To the extent the General Counsel would otherwise rely on the Ray referral work period as establishing parameters of a lost period of employment for Russell, that is simply not shown to be warranted on this record. The only employment period at all arguably to be viewed as supportive thereof would be that of the work period of Figg, who was referred as a hi-lift operatior, thus starting no earlier than Monday, March 16. But this presupposes again that a request had been made by Lewis of Mears (or someone) initially for Russell at the time of the requested referral of Figg. At best Lewis has receded from the alternative of communication with Bland or Mears to communication with Mears. I do not credit the latter was the case. On this record, I am also not persuaded to make a finding that there was any communication with Bland (despite Bland's nonappearance as a witness) given the nature of Lewis' inconsistent and unconvincing testimony in this entire area of his claimed calls to the hall requesting a Russell referral. However, even if I were to have found the same otherwise sufficiently supported to draw further suportive adverse inference from the Union's failure to call Bland as a witness, there would remain insufficient evidence of improper refusal, particularly with the fact that Russell did not sign the out-of-work list, as determined infra.

It rather appears shown more probable on this record that Lewis and Bischoff themselves had early recognized a potential difficulty with Russell having left the Outer Loop to accept an employment assignment with Bluegrass at the nonunion Corbin project and the more so after Russell reported to Lewis there was a problem. While Bischoff and Lewis may have had Russell's reemployment at the Outer Loop under active consideration during that period, I am in the end convinced that Russell was at the hall prior to the initial Raymond general request for a hi-lift operator not only to smooth the way for a referral by paying dues, but also to check on a clearance to return to the Outer Loop. Whether Russell had been sent there for that purpose, as believed by Bischoff, or went there first on his own on his return to the area and thereafter reported to Lewis at the jobsite, the fact is he later reported to Lewis that there was going to be a problem with his return; and Lewis in turn probably immediately reported that to Bischoff. Bischoff's determination to avoid indicated hassle, by then doing right and hiring first through the hall, is both revealing and wholly compatible with a Russell contact of Mears before any actual Raymond request had been made for his services. Existing circumstances being then overall indicative of Russell's solicitation of his own work from Raymond the same could well be viewed by Bischoff as likely then to only add to the likelihood of a hassle if a request was then to be made by Raymond for Russell's referral by name. The short of it is the Union had its contractual hiring hall arrangement with Raymond, and with Bluegrass specially, on the Fisherville project, but not otherwise with Bluegrass. Employer preservation of its "double breasted" operations without union question was also likely to be an existing concern. See *Al Bryant, Inc.*, 260 NLRB 128 fn. 2 (1982), enfd. 711 F.2d 543 (3d Cir. 1983).

In any event, the Union's second argument is even the more persuasive. It rests mainly on its contention that, under the established practices of this exclusive hiring hall, a man who was out of work who wished to be referred had to be on the out-of-work list to be referred by the Union. When Russell came to the hall on March 12 looking to be referred to the Outer Loop, so argues the Union, he was clearly out of work (at Bluegrass). Though I agree, and I find Russell was by that time out of work with Bluegrass, I do not mean to imply that Russell, a layman, did not with his own conviction hold the view he was just being once again switched around, this time to Raymond, and did not view himself as then out of work, particularly with that view now shown well supported by Raymond supervision earlier having (at least) encouraged Russell, while still on vacation, to take steps looking toward his return to the Outer Loop, and having given Russell assurance (at least at some point) that they were going to try to get him on the Outer Loop.

Although I have not been persuaded, in light of record evidence indicating the contrary, to credit Russell's one time assertion that he had been told even before he left on vacation to return to the Outer Loop, I find myself also not persuaded, on further reflection, that his later initial inquiry of Bischoff, known by Russell in the past to be a supervisor of Bluegrass and Raymond work off and on, especially given Bischoff's 1–2 visits early in 1981 to the Corbin jobsite with a superintendent, constituted Russell engagement in solicitation of prospective employment of an order dissimilar to that previously practiced by other *current* employees. But what Russell may have reasonably thought of his own situation, and of Bischoff's status, is not dispositive.

Although the Union contended at the hearing, and Mears testified, that Russell had solicited his own employment, Mears' conclusion rested not on any awareness and evaluation of the circumstances of the *prior* Russell-Bischoff contacts, but on Mears' own awareness only of Russell's appearance at the hall on March 12 requesting that he be sent (I find) back to the Outer Loop, Mears' proper refusal, there being no current Raymond request made to him for such a referral, and Mears' subsequent observance of Russell working on the job. Their second conversation did not notably alter that circumstantial appearance. Thus, even assuming that, by the time of the second conversation between Russell and Mears, Mears (and/or Mills) was then fully aware of Russell's interim employment with Bluegrass, the subsequent action taken by Mears (and/or Mills), if taken with the purpose to preclude Russell's perceived taking unfair advantage of his employment history in the "double breasted" operations of Raymond and Bluegrass to improperly obtain reemployment opportunity with Raymond in circumvention of hiring hall practice and applicable to other former employees of Raymond, would appear to be, on its face, union action undertaken for legitimate purpose. Mears' testimony that it was his view that Russell had solicited his own employment was plausible, and I find credible.

The Union does not appear (on brief) to have pressed the contention that Russell solicited his own job so much as to rely on the fact that Russell, in any event, had gone to work for Raymond without the proper hiring hall clearance,[5] and to defend Mears' suspicion of an attack upon the hiring hall's integrity, and action thereon, as reasonable. In agreement with the General Counsel, I do not find the instances advanced by the Union of its prior discipline of two members in Paducah to have been shown persuasively to have been awarded on the same circumstances as were applicable to Russell. Nonetheless, those incidents do show, and I find them to be, instances where the Union has, in recent past, policed its own members on matters (even then) independently viewed by the Union to constitute an attack upon the integrity of the operation of its exclusive hiring hall, only the more aggravated in nature by virtue of occurring in difficult employment times. However, the relevant consideration in the latter respect, it seems to me, is not whether I or the Board would agree on the merits with the result of an internal union trial, but whether the Union has violated the Act in bringing Russell to trial and imposing a fine. I cannot conclude that the Union in urging Russell to voluntarily leave the Outer Loop, and in subsequently bringing charges against (and fining) Russell for accepting employment without job clearance, was not acting out of legitimate concern for other unit employees.

[5] The Union's trial minutes report the complainant, who was Mears, later went to the jobsite and explained to Russell "that he was in violation of the Hiring Procedure and told him that he was filing a charge against him for working for Raymond without proper clearance." Although I credit Russell's testimony that that was *not* one of the sections initally noted by Mears that would be charged, the same did appear in the formal charge notice legally served on Russell, which Russell subsequently elected not to pick up.

The Union argues persuasively also that, even if Bischoff had earlier told Russell that he could obtain a job at the Outer Loop when the work began, that did not relieve Russell of his own responsibility to sign the out-of-work list. Without Russell doing that, so argues the Respondent, the Union could not refer him. Thus, even if Raymond had called the hall asking for Russell by name he could not be referred out because he had not signed the out-of-work list. The Union's argument is no less effective because it is one of a legal result flowing from the circumstances ultimately shown of record. The dispostive factual question has come down, in the several arguments made, to the nature of the Respondent's hiring hall *requirement* on a registry of an out-of-work individual on its out-of-work list.

Raymond's clear obligation, under its contract with the Union, is to secure *all* its new, additional, or replacement employees, when necessary, from the Union's hiring hall *exclusively*. Bischoff and Lewis knew that, and they have essentially attested to it. Although both Bischoff and Lewis have related occasions of having called a current, or former, employee to a job directly, without a prior union notification, it is initially to be observed it was never in derogation of the hiring hall's permitted preferences, e.g., beyond an allowed transfer-assignment of (essentially) a current employee, or of an employee who demonstrably would qualify as a former employee, employed by Raymond within the past 12 months. Even more significantly, Bischoff immediately disclaimed it as being his practice to do so; and Lewis' related testimony was, in effect, that when he called men directly it was usually after hours, and that, even where he had called men back directly, he almost invariably would notify the hall the very next day.

To be sure, the record also reveals either might on occasion fail to call the hall. But then it was candidly acknowledged that the man himself would probably call the hall. They were both fully aware that there was always in any event the (visiting) business agent who would know how long (and when) the recalled employee had previously worked. It is clear to me from this record that Bischoff and Lewis in describing their instances of recall of an individual without prior notification to the Union were describing a practice exception, not making claim of an existing regular practice or rule. The short of it is that Bischoff and Lewis both knew they were contractually supposed to use the hall first for recruitment of all new, additional, or replacement employees.

In that connection, the out-of-work list procedure is clearly a reasonable and integral part of the operation of the instant hiring hall. Its required use, as depicted herein, only the more convincingly appears to be a fully reasonable procedure when viewed in the light of the number of employers and their differing equipment operator needs and the number of individuals, their qualifications, and their area preferences to be simultaneously coordinated and served by this hall's operation.

Bischoff and Lewis were surely generally aware of those circumstances, just as much as they were aware that in a given case the 12-month practice, or rule, could in certain cases be used by Raymond to shortcut a de-

sired individual's actual placement on the out-of-work list and affect his immediate referral. They both thus knew they could get a qualifying former employee to a new job, or back from winter shutdown, when the employer requested him by name. However, to the extent that the General Counsel would appear to have argued herein that operation of the 12-month practice served to regularly exempt individuals from any required registering on the out-of-work list, I find that to be wholly against the weight of the credible evidence of record. The actual circumstance is that, though Bischoff and Lewis were aware of the Union's operation of an out-of-work list, and of their own right to recall a former employee under the 12-month practice regardless of his position on that list, neither Bischoff or Lewis had to be themselves personally concerned with its upkeep or ensure its nondiscriminatory use on a day-to-day basis.

In contrast, the Union necessarily and daily did. I find generally that its advanced claim that it would not refer an individual upon an employer request of an individual by name if the name of that individual did not presently appear on the out-of-work list is both reasonable and plausible. To hold otherwise, it seems to me, would be to only now enslave the Union to the same waste and baggage of inefficient ills that caused use of the hiring hall to arise in the first place. Cf. *Teamsters Local 357*, 365 U.S. at 672.

Absent an appearance of the individual's name on the out-of-work list when the request was made by an employer, the Union would uniformly have no way of knowing, short of engaging in multiplicitous and no doubt regular inefficient inquiry, or by some happenstance awareness, whether an individual was both out of work and then actually seeking employment. Nor can I conclude that this Union's apparent unwillingness to incorporate either of the latter procedures in the operation of a hiring hall of this size was unreasonable in its approach of meeting its basic responsibility to operate the hall in a fair and nondiscriminatory manner. Nor can I ignore the independently plausible import of adopting and maintaining procedures that would serve it well in the capacity to prove the latter when and if called upon to do so, a consideration which, I have no doubt, has governed as the basis for the related regular procedure of business agents even then requiring a letter from an employer specifying request for an individual's referral by name, where that individual was known to have had employment with a different employer in the interim. In the latter respect, that Mears did not raise such on Russell is wholly compatible with his assertion that he had not had any earlier request for a Russell referral from Raymond.

Even if the Union has in the past, in effect, condoned an employer's occasional failure to make a request of the Union for referral on callback, as when an individual on the out-of-work list subsequently reported a direct recall and it was processed, that is not what Raymond or Russell did here initially. There was no evidence presented herein that has convinced me that the Union had a practice of foregoing the requirement that the individual with a break in employment had to register on the out-of-work list to be referred.

If I have had any remaining hesitation in this matter it rests solely in consideration of the question of whether the Union adequately met its inherent duty to fairly represent *Russell*, as well as others, in the use of the hall. In that regard Russell clearly later raised a claim of having worked at the Outer Loop before to Mills and in Mears' presence. In my view, it is no answer to the question of fair representation for a business representative to respond to a claim of an employee that it has no record of that employee's working on the project, e.g., without making reasonable effort to ascertain if the fact is other than its record shows. Here clarification was at most a telephone call (to Buchanan) away. While noncreation, or more likely misplacement, of a work record may be viewed a related suspicious circumstance, errors do occur in the operation of a hiring hall. As former Administrative Law Judge George L. Powell observed, "So long as unions are permitted to operate exclusive hiring halls we must expect human errors and indeed expect occasional moments of compassion." See *Operating Engineers Local 513 (J. S. Alberici Construction)*, 206 NLRB 676, 678 (1973).

In the same vein, also initially appearing as somewhat disconcerting, on the result reached herein, was Mills' failure to definitively respond to Russell as to what specifically was the reason for the Union's refusal to refer him at the time, especially given, as earlier observed, that a refusal to refer Russell because he had worked on a nonunion job would be violative of Section 8(b)(1)(A) and (2). But that is not the theory on which this case has proceeded, and the same, in any event, appears contraindicated by the central fact found herein, viz, that, when Mears refused Russell's initial request to be sent back to the Outer Loop, Raymond had not requested Russell's referral, *and* at the time of doing so Mears had no reason to then suspect that Russell had been working all along on a Bluegrass nonunion job. Thus, even if it were to be concluded that that matter was one covered by the amended complaint's broad language of "reasons other than Charging Party's failure to tender periodic dues" and a matter to be deemed sufficiently litigated herein, which I do not, I cannot conclude from the evidence of record that the Union has been shown by the predominating evidence to have refused to refer Russell on that account.

Rather, the Union's positions, and its interpretations of the hiring hall provisions and practices, appear the more reasonably to be supported herein. Thus, under the more clearly appearing practice Raymond had to request Russell's referral; and I have found it did not. Similarly, Russell, for his part, at the point of conclusion of his work period with Bluegrass on the Corbin job, had to register on the out-the-work list, but he did not, because he, however reasonably, has mistakenly viewed his employment by Raymond and Bluegrass as being one ongoing period of employment in which he was but being switched around. The Union did not by misrepresentation or withholding of information cause Russell not to register on the out-of-work list. To the contrary Mears had from the start urged Russell to get on the out-of-work list which notably would have qualified him for

later referral to Raymond, as a former Raymond employee, upon a Raymond request, *or* put him in position for a nondiscriminatory processing of his direct called return. While it is true that Mears in urging Russell to register did not encourage Russell as to his (desired) return to Raymond's Outer Loop, there was no reason for Mears to then do so, as (I have found) there was no prior Raymond request for his referral by name at the time.

Finally, that the Union has elected not to pursue a contest (with Raymond) over Raymond's claim under the contract to be able to replace an unqualified union referee with a direct call on its own, apart from also not being advanced as a theory of the case, does not make the case of prior union nonreferral of Russell discriminatory as charged in the complaint. The Respondent in pertinent part accurately summarized, "To require other individuals to sign an out-of-work list before referral is made, but not Russell . . . would be a breach of the Union's duty of fair representation to its members." In my opinion that is a view reasonably held by the Union on the facts appearing herein, and one not to be deemed contraindicated by the engrafted circumstance of an individual's employment in "double breasted" operations.

Consideration of the scope of the complaint's allegations aside, had the evidence offered herein convinced me that Mears and/or Mills had withheld the Union's fair representation from Russell in some manner because he had worked in the nonunion side of the double breasted operations, I would find the violation. However, Mills mere unwillingness to discuss the Union's view of Russell's changed status to that of former employee of Raymond by virtue of his (voluntary) interim employment with Bluegrass at Corbin just does not persuade me of that, where the Union had no triggering request from Raymond for his referral at the time. Neither, in my view, was it incumbent on Mills or Mears to suggest to Russell that if he registered on the out-of-work list and it thereafter received a Raymond request it would refer Russell, where it was against practice for an individual to go out and solicit his own work from a signatory employer.

As the complaint does not allege, nor have the parties sought to litigate herein, any issue of effect of a coordination of a union rule requiring payment of a fine before acceptance of dues in conjunction with a collective-bargaining agreement's union-security clause as constituting an independent implied threat in violation of Section 8(b)(1)(A), I need not reach or resolve such an an issue now. But see *Elevator Constructors Local 8 (San Francisco Elevator)*, 243 NLRB 53 fn. 1 (1979), motion for reconsideration denied 248 NLRB 951 (1980), enfd. 665 F.2d 376 (D.C. Cir. 1981).

For all the foregoing reasons, I conclude and find that the preponderance of the evidence does not support the allegations of the complaint herein that Local 181 failed to refer Russell upon request of Raymond, or unlawfully thereafter attempted to cause Raymond's discharge of Russell in violation of Section 8(b)(1)(A) and (2) of the Act; nor that it unlawfully disciplined Russell in violation of Section 8(b)(1)(A). Accordingly, I shall recommend the amended complaint herein be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. Raymond Construction, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The alleged violations of the Act by the Respondent were not established by a preponderance of the credible evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.